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No. (2) 06-759

In The

Supreme Court of the United States

COMPUTERVISION CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the ability of the Internal Revenue Service ("IRS") to waive compliance with regulations regarding the form of a refund claim, as recognized by this Court in *United States v. Kales*, 314 U.S. 186 (1941), is limited to situations where the waiver occurs prior to the expiration of the period for filing new refund claims.

2. Whether the filing of a complaint in a tax refund suit terminates a taxpayer's ability to amend a refund claim that is pending before the IRS and has not been acted upon.

3. Whether amendments to a refund claim that is pending before the IRS are limited to ones that "claim an identical amount under a different theory," as the Federal Circuit held in this case.

RULE 29.6 STATEMENT

Computervision Corporation is a wholly-owned subsidiary of Parametric Technology Corporation, a publicly held corporation.

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PETITION FOR A WRIT OF CERTIORARI

Computervision Corporation ("Computervision") respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (reproduced in the Appendix to this petition ("App.") at 1-33) is reported at 445 F.3d 1355. The order denying panel rehearing and denying rehearing *en banc* (App. 119-20) is not yet officially reported, but is available, together with the court's supplemental opinion thereon (App. 34-38), at 2006 WL 2505690. The opinion of the United States Court of Federal Claims (App. 39-118) is reported at 62 Fed. Cl. 299.

JURISDICTION

The court of appeals entered its judgment on April 20, 2006, and denied the petition for rehearing on August 30, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The following statutes, regulations and administrative authorities are reproduced in the Appendix at 121-26: Sections 6511(b)(1), 6513(b)(2), 6601(a), 6611(d), 6621(d) and 7422(a) of the Internal Revenue Code ("IRC" or the "Code"), Title 26 of the United States Code; Sections 301.6402-2(b)(1) and 301.6611-1(h)(2)(vii) of the Treasury Regulations ("Treas. Reg." or "Reg."), Title 26 of the Code of Federal Regulations; Section 5 of Executive Order No. 6166 (June 10, 1933), *reprinted as amended in* 5 U.S.C. § 901 note; and Section 20.2.8.9.1(1)(A) of the Internal Revenue Manual.

STATEMENT OF THE CASE

Jurisdiction in the Court Below

The Court of Federal Claims has jurisdiction over claims against the United States under any Act of Congress, including claims for tax refunds. *See* 28 U.S.C. § 1491(a)(1). The dispute in this case, as described below, is over the scope of the issues that a court may consider when a taxpayer sues for a refund.

Nature of the Dispute

The parties' dispute relates to the application of the so-called "doctrine of variance." With certain exceptions, that doctrine deprives a court of jurisdiction to allow a tax refund on grounds that were not specifically set out in the refund claim that the taxpayer filed with the IRS.

Computervision filed a timely claim for a refund on August 4, 1989, after paying interest that the IRS had assessed on an underpayment of Computervision's tax liability for its 1982 taxable year. App. 4, 146-47. In making the assessment against Computervision, the IRS had determined that Computervision's subsidiary, Computervision International Corp. ("CVI"), failed to qualify as a domestic international sales corporation ("DISC") for its taxable year ending January 31, 1983. App. 3, 146-47. In a separate proceeding, the United States Tax Court disagreed: It held that CVI did qualify as a DISC for that year. App. 5-6, 147-48. As a result of that decision, the parties agree that Computervision is entitled to a refund of at least $2,997,761.42 of the interest collected by the IRS, and the Court of Federal Claims awarded judgment in that amount in the proceedings below. App. 9.

The parties also agree that the IRS assessed and collected more interest than Computervision actually owed because the IRS's interest computations failed to take into

account the "use of the money" principle applied in Revenue Ruling 99-40, 1999-2 C.B. 441 and *Sequa Corp. v. United States*, 99-1 U.S.T.C. ¶ 50,379 (S.D.N.Y. 1998). App. 162. Under that principle, the accrual of interest on Computervision's 1982 tax liability should have been suspended during the period in which the government had the interest-free use of funds belonging to Computervision. Although the parties disagree on some aspects of the computation, there is no dispute that Computervision would be entitled to an additional refund of at least $228,922.76 if the trial court had jurisdiction to allow a refund on that basis.[1]

While there is no dispute that the use-of-money principle requires the suspension of interest accrual in the circumstances presented in this case, the defendant maintained that the variance doctrine precluded the trial court from taking that principle into account in determining the amount of the refund to which Computervision was entitled, because Computervision's original refund claim did not specifically raise the issue. App. 67-68. The Court of Federal Claims allowed the defendant's motion to dismiss Computervision's claim for interest suspension on that ground (App. 40-41, 118) and the court of appeals affirmed (App. 33). Neither court addressed the merits of the parties' dispute regarding the period for which the

[1] The figure in the text is based on computations made by the IRS in August, 2000, showing an overpayment of $3,226,684.18 (App. 162), which is $228,922.76 more than the amount awarded by the trial court. In those computations, the accrual of interest on a portion of Computervision's 1982 deficiency was suspended for the period through March 15, 1984, the due date of Computervision's 1983 income tax return. App. 162, 164. Computervision maintained that the suspension of the accrual of interest should have continued through August 2, 1985, because the defendant continued to have the interest-free use of the money until that date. App. 40.

accrual of interest should have been suspended in this case. *See* note 1, *supra*.

Statement of the Facts

On its 1982 federal income tax return, Computervision reported an overpayment that it elected to credit against its estimated tax liabilities for the following year ("the 1982 Credit Election"). App. 2, 144. However, none of that money was actually needed to satisfy Computervision's 1983 estimated tax obligations. *See id.* On its 1983 return, Computervision instead reported an overpayment that exceeded the amount of the 1982 Credit Election by millions of dollars. *Id.* As a result, the government had the interest-free use of the funds represented by the 1982 Credit Election for the entire period through the due date of the 1983 return.[2]

Computervision elected to credit the entire amount of the overpayment reported on its 1983 return against its estimated tax liabilities for 1984 ("the 1983 Credit Election"). *Id.* Again, however, Computervision reported an overpayment on its 1984 return that exceeded the amount of the 1982 Credit Election. *Id.* As a result, the government continued to have the interest-free use of the funds represented by the 1982 Credit Election until Computervision received a refund of the 1984 overpayment, without interest, on August 2, 1985. App. 3, 144.

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[2] The government had the use of the funds free of interest because estimated tax payments are treated as having been made on the due date of the return for the year to which the payments relate for purposes of computing interest on overpayments. *See* I.R.C. §§ 6611(d), 6513(b)(2). Regulations further eliminate any obligation to pay interest on an overpayment of a tax liability for which a credit election is made. *See* Treas. Reg. § 301.6611-1(h)(2)(vii).

Although Computervision had reported an overpayment on its 1982 return, the IRS determined on audit that Computervision had underpaid its tax liability for that year. App. 3, 145. The asserted deficiency was due, in part, to the IRS's determination that CVI did not qualify as a DISC for the year ending January 31, 1983. *Id.*

While the audit was going on, Computervision suffered a net operating loss ("NOL") for its 1985 taxable year that could be carried back and used to offset any deficiency for 1982. App. 4, 145-46. Despite the offsetting of the NOL against the deficiency, however, Computervision remained liable for interest to the extent there was any underpayment of the 1982 tax between March 15, 1983 (the statutory due date of the 1982 return) and March 15, 1986 (the statutory due date of the 1985 return), plus additional interest on the accrued interest for the period after March 15, 1986. *Id.*

On June 3, 1988, the IRS assessed the amount of deficiency interest it determined that Computervision owed. App. 146. The IRS did not take the 1982 or 1983 Credit Elections into account in determining the amount of the underpayment on which interest was due, even though the defendant had the interest-free use of those funds until they were refunded to Computervision on August 2, 1985. *Id.* Computervision paid the entire amount of interest the IRS had assessed. App. 4, 146.

On August 4, 1989, Computervision filed a timely claim for a refund with respect to its 1982 taxable year. App. 4, 147. In an attachment accompanying the claim, Computervision stated that it was requesting a refund of "the portion of the interest paid that is attributable to the disqualification of [CVI] as a DISC for its fiscal year ending January 31, 1983." App. 138. The attachment stated as a further basis for the refund "such other grounds as are shown to be appropriate by the tax returns,

books and records and the [IRS] Examination Report and related Protest" submitted by Computervision. App. 5, 142.

Eight months later, and before the IRS had taken any action on the administrative refund claim, Computervision filed its complaint with the Court of Federal Claims. App. 5, 147. The case was held in suspense, pending the resolution of separate proceedings in the Tax Court involving CVI's qualification as a DISC. App. 5-6, 147-48. As indicated above, the Tax Court ultimately rendered its decision in favor of Computervision on that issue, eliminating most, though not all, of the deficiency determined by the IRS. *Id.*

Following the Tax Court's decision, Computervision exchanged at least thirteen letters with the Department of Justice ("DOJ") and the IRS regarding the computation of the interest on Computervision's tax liabilities. App. 6, 149-50. In that correspondence, the parties resolved a number of issues relating to the computation of Computervision's deficiency interest for 1982, even though those issues had not been specifically raised in Computervision's original refund claim. App. 48-50.

In addition to addressing other issues in that correspondence, Computervision sent letters to both the DOJ and the IRS requesting that the interest computations be revised to include a netting of interest under Section 6621(d) of the Code. *See* App. 150, 154-59 (letters dated May 2, 2000). On August 17, 2000, the IRS responded by providing computations made by an IRS interest specialist that included a suspension of interest on the 1982 deficiency from March 15, 1983 until March 15, 1984, the due date of Computervision's 1983 return. App. 160-78. The accompanying memorandum explained that suspension as follows: "Revenue Ruling 99-40 (*Sequa*) is applied regarding the credit elect to 1983. *No claim is necessary.*" App. 162 (emphasis added). The application of interest

suspension in those circumstances, independently of any specific claim therefor, accorded with applicable IRS procedures, which called for the application of "all normal interest considerations (*i.e.*, Revenue Ruling 99-40)" in computing interest on a deficiency that is offset by an NOL. Int. Rev. Man. § 20.2.8.9.1(1)(A) (July 31, 2001).[3]

More than two months later, the DOJ sought to repudiate the computations that had been made by the IRS based on an asserted variance from Computervision's original refund claim. *See* App. 6-7 (referring to letter of October 25, 2000). The IRS itself never raised the issue of variance or otherwise disputed its own interest computations, nor did it ever take any other formal action on Computervision's refund claim. App. 150. On April 4, 2002, Computervision amended its claim to specifically request the application of interest suspension. App. 7, 151.

The Decisions Below

Computervision's claim for interest suspension is based on the use-of-money principle developed by this Court in *Manning v. Seeley Tube & Box Co.*, 338 U.S. 561 (1950). Beginning with the Second Circuit's decision in *Avon Products, Inc. v. United States*, 588 F.2d 342 (2d Cir. 1978), cases applying that principle in the context of a credit election have consistently held that the accrual of interest on a tax deficiency is suspended during the period in which the government has the interest-free use of the taxpayer's money.[4] Since its acquiescence in *May Department Stores*,

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[3] Like the corresponding reference in the memorandum accompanying the IRS interest computations, the reference to Revenue Ruling 99-40 in the manual relates specifically to the application of interest suspension. *See* Rev. Rul. 99-40, 1999-2 C.B. 441.

[4] Interest suspension derives from a construction of Section 6601(a) of the Code as providing for the accrual of deficiency interest only in

(Continued on following page)

the IRS no longer disputes that point, at least in principle. *See* note 3 and accompanying text, *supra*. Like the trial court itself, however, the Federal Circuit held that the Court of Federal Claims had no jurisdiction to allow any refund on that basis. App. 10-30.

The jurisdictional issue is derived from Section 7422(a) of the Code, which requires a taxpayer to file a timely refund claim in order to obtain a refund of federal taxes. Computervision agrees that, under Section 7422(a), the filing of a timely refund claim is a jurisdictional prerequisite to the bringing of a suit for a refund in the Court of Federal Claims. There is no dispute in this case, however, that Computervision satisfied the timing requirement of Section 7422(a) by filing a claim within two years after it paid the disputed interest. App. 4, 146-47. The dispute relates instead to the effect of a requirement in regulations adopted by the Treasury Department that a refund claim must set forth the grounds on which the taxpayer is seeking a refund. *See* Treas. Reg. § 301.6402-2(b)(1).

In both the trial court and the court of appeals, Computervision advanced three reasons why the requirement in Reg. § 301.6402-2(b)(1) did not bar Computervision from obtaining a refund based on the application of

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situations where the tax is "both due and unpaid." *Avon Products*, 588 F.2d at 344. In situations where the taxpayer has made a credit election, that condition is not satisfied during periods in which the government has the use of the taxpayer's money. In such situations, the courts have held that interest does not accrue under Section 6601(a) until the credit election is needed to satisfy the taxpayer's estimated or actual tax liabilities for a subsequent year. *See, e.g., Brookhurst, Inc. v. United States*, 931 F.2d 554, 558 (9th Cir.), *cert. denied*, 502 U.S. 907 (1991); *Avon Products*, 588 F.2d at 343-44; *Sequa*, 99-1 U.S.T.C. at 87,929; *May Dep't Stores Co. v. United States*, 36 Fed. Cl. 680, 684, 688 (1996), *acq.*, 1998-1 C.B. 5.

interest suspension: first, that its original refund claim was adequate to satisfy the requirement in the regulations; second, that the IRS had waived any insufficiency in that claim when it not only took interest suspension into account in its own computations but also explicitly stated that "[n]o claim [was] necessary" for that purpose; and, third, that Computervision had amended its refund claim to include that ground while the claim was still pending, as permitted by the controlling case law.

After concluding that the original refund claim was insufficient, both the trial court and the Federal Circuit rejected Computervision's reliance on a waiver by the IRS on the ground that any such waiver must itself occur before the period for filing refund claims expires. *See* App. 18 ("we agree with the Court of Federal Claims that the IRS cannot waive the requirements of its regulations by conduct outside of the limitations period"), 103-05. In so doing the Federal Circuit acknowledged but declined to follow contrary authorities in the Second Circuit and the United States Tax Court. App. 19-20.

Based on a seventy-year-old executive order that had never been applied in that fashion before, the courts below also held that Computervision lost the ability to amend its refund claim when it filed its complaint in the Court of Federal Claims, even though the claim remained under consideration by the IRS while the case was pending in the trial court. *See* App. 29, 108-09 (citing Exec. Order No. 6166, § 5). The court of appeals did, however, acknowledge the contrary authority in the Second and Eleventh Circuits on that issue. App. 29-30. Both courts below also held that the amendment failed to satisfy a requirement that the amended claim be "germane" to the original claim. App. 27-28, 106-07.

Computervision sought a rehearing or rehearing *en banc* in the Federal Circuit on the waiver and amendment

issues. In its petition for rehearing, Computervision pointed out that the black letter rule regarding the timeliness of waivers by the IRS that the courts applied below cannot be found in prior cases and is inconsistent with this Court's decision in *Kales*, as well as the decision of the Fifth Circuit in *United States v. Henderson Clay Products*, 324 F.2d 7 (5th Cir. 1963). More generally, that rule is inconsistent with the rules established by this Court regarding the amendment of refund claims. The allowance of an amendment to a pending refund claim is itself merely one particular form of waiver of the requirements in Reg. § 301.6402-2(b)(1) that is clearly permitted after the limitations period has expired. *See United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 64, 71 (1933).

Like their analysis of the waiver issue, the courts' treatment of Computervision's amendment created a conflict with settled law. The Second Circuit had long ago specifically rejected the view of Executive Order 6166 that was adopted by the Federal Circuit and the Court of Federal Claims in this case. *See St. Joseph Lead Co. v. United States*, 299 F.2d 348 (2d Cir. 1962). In addition, the courts below misstated and misapplied the germaneness rule, as set out in *Pink v. United States*, 105 F.2d 183 (2d Cir. 1939), and adopted by the Federal Circuit's predecessor in *Addressograph-Multigraph Corp. v. United States*, 112 Ct. Cl. 201, 78 F. Supp. 111 (1948). The petition for rehearing was nevertheless denied. App. 38, 120.

REASONS FOR GRANTING THE WRIT

The provisions relating to refund claims now found in Section 7422(a) of the Code and Reg. § 301.6402-2(b)(1) date back to the origins of the federal income tax. This Court laid the groundwork for the application of those provisions in three cases decided simultaneously in 1933: *Memphis Cotton Oil*, *United States v. Henry Prentiss &*

Co., 288 U.S. 73 (1933), and *United States v. Factors & Finance Co.*, 288 U.S. 89 (1933).[5] Although the Court revisited the subject a number of times in the decade or so following those cases, it has not done so again since the 1945 decision in *Angelus Milling Co. v. Commissioner*, 325 U.S. 293.

The variance doctrine and its exceptions need to be applied correctly and consistently in order to assure the equal treatment of taxpayers seeking to obtain refunds of taxes and interest that were either paid in error or, as in this case, wrongly collected by the IRS. The Court's sixty years of silence does not mean that all of the questions have already been answered. As demonstrated by the issues presented in this case, there are basic questions that have yet to be clearly and finally resolved about the waiver of a variance and the amendment of refund claims.

The lack of clarity and finality is highlighted first and foremost by the Federal Circuit's explicit acknowledgement and rejection of contrary authorities on those issues from other jurisdictions, including the Second Circuit

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[5] As the Court itself later described it, *Memphis Cotton Oil* held that "a general claim for refund, not specifying grounds, is subject to amendment until final rejection irrespective of a limitation running in the interval." *Factors & Finance Co.*, 288 U.S. at 93. *Prentiss*, on the other hand, held that "a claim specifying as the sole ground for relief the necessity for a special assessment by reason of anomalous conditions prevailing in the claimant's business may not be turned by amendment into one for the revision of an assessment by increasing the value of real estate included in invested capital." *Id.* Finally, the decision in *Factors & Finance Co.* was "midway, or near to that, between the other two": The taxpayer in that case "did not specify any ground in the claim first presented, but offered an amendment afterwards setting forth the reasons why the assessment should be special." *Id.* While the case was "a close one, giving fair opportunity for argument either way," the Court upheld the "privilege of amendment" in *Factors & Finance Co.*, just as it had in *Memphis Cotton Oil*. *Id.* at 94.

(App. 19-20, 29-30), the Eleventh Circuit (App. 29-30) and the United States Tax Court (App. 19-20). As noted above, the Federal Circuit's conclusion that the IRS, in considering a timely filed refund claim, cannot waive the specificity requirements of its regulations and consider new issues after the expiration of the period in which new refund claims can be filed, was also contrary to the decision of the Fifth Circuit in *Henderson Clay Products*, which the Federal Circuit did not even acknowledge. Those conflicts are discussed below at pages 13-18 (waiver) and 23-26 (amendment).

In declining to follow the decisions of the Second Circuit and the Tax Court on the waiver issue, moreover, the Federal Circuit further muddied the waters by relying on two more recent decisions of this Court that did not involve any issue of "variance" because no timely refund claims had ever been filed. See App. 19-20, relying on *United States v. Brockamp*, 519 U.S. 347 (1997), and *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), and the discussion below at pages 19-21. The Federal Circuit's reliance on those decisions in this context cast doubt upon the "sharp" distinction or "line of division" drawn in this Court's variance cases between the requirements imposed by Treasury regulations, which the IRS can waive, and those imposed by statute, which it may not. *Memphis Cotton Oil Co.*, 288 U.S. at 71; *see also Angelus Milling Co.*, 325 U.S. at 297.

Finally, in addition to rejecting the Second Circuit and Eleventh Circuit authorities on the timing of amended claims, the Federal Circuit also adopted a view of the germaneness doctrine that conflicted with the Second Circuit's decision in *Pink*. See App. 26-27, and the discussion below at pages 26-29.

The court should grant certiorari to restore a degree of clarity to the variance doctrine and to reconcile the multiple conflicts of authority created by the Federal Circuit's decision.

I. THE FEDERAL CIRCUIT ADOPTED A NEW RULE REGARDING WAIVERS BY THE IRS THAT IS CONTRARY TO PRECEDENT IN MULTIPLE JURISDICTIONS AND TO THE CONTROLLING DECISIONS BY THIS COURT.

A. The Federal Circuit Decision Conflicts with Existing Authorities on the Timeliness of Waivers by the IRS.

As demonstrated by the Federal Circuit's decision below, one question regarding the treatment of refund claims that has yet to be clearly and finally resolved is whether the IRS can waive the requirements in Reg. § 301.6402-2(b)(1) by "conduct outside of the limitations period." App. 18. Although the Federal Circuit itself answered that question in the negative, it acknowledged that prior cases have reached a different conclusion. *See* App. 19-20 (citing *Dale Distrib. Co. v. Commissioner*, 269 F.2d 444 (2d Cir. 1959), *Eisenstadt Mfg. Co. v. Commissioner*, 28 T.C. 221, 233 (1957), *acq.* 1957-2 C.B. 3, and *Martin Weiner Corp. v. Commissioner*, 26 T.C. 128 (1956)).

The Federal Circuit dismissed the prior case law as consisting of "a few Excess Profits Tax cases" that were "not binding on this court." App. 19-20. Rejecting those authorities, the Federal Circuit adopted a black letter rule that the IRS is incapable of waiving the regulatory requirements for a refund claim once the limitations period has run. Since that rule would have applied to the regulations under the excess profits tax just as much as it does to Reg. § 301.6402-2(b)(1), it is wholly beside the point that the cases cited in the Federal Circuit's opinion "involved special regulations under the Excess Profits provisions that imposed unusually detailed claim requirements." App. 19-20. The decision below therefore creates a direct conflict with the decisions in *Dale*, *Eisenstadt*, and *Martin Weiner Corp.*

There are also other cases on point that, while similarly not binding on the Federal Circuit, did *not* involve the "unusually detailed claim requirements" for the excess profits tax. App. 19-20. One such case cited in Computervision's briefs below is *United States v. Henderson Clay Products*, 324 F.2d 7 (5th Cir. 1963), where the Fifth Circuit found "ample support" for applying the waiver doctrine in a situation where the IRS had "investigated . . . for two and a half years" an "alternative ground for refund" that the taxpayer did not raise until long after the limitations period had run for some of the years at issue. *Henderson Clay Products*, 324 F.2d at 17-18. While the Federal Circuit cited *Henderson Clay Products* in passing in a footnote addressing a different issue (*see* App. 26 n.16), the court simply ignored the inconsistency between its own decision and the application of the waiver doctrine in that case.

The Federal Circuit was more forthright in acknowledging Computervision's reliance on *Schenley Indus., Inc. v. Commissioner*, 42 T.C. 129 (1964). *See* App. 19 n.11. As the Federal Circuit described that case, the Tax Court held in *Schenley* that "the IRS 'waived' the specificity requirement [in Reg. § 301.6402-2(b)(1)] by failing to timely raise the variance defense during litigation." *Id.* (quoting *Schenley*, 42 T.C. at 170). The Federal Circuit claimed that *Schenley* is distinguishable because the issue here is "whether [the IRS] can waive the [variance] defense through administrative action," not whether "the government" can waive that defense "through inaction during litigation." *Id.* The issue here, however, is not *how* the defense can be waived, but rather *whether* the variance defense can be waived at all once the limitations period has run. Like the excess profits tax cases cited by the court, *Schenley* held that it can. As indicated by the court's own description, moreover, the party that waived the defense in *Schenley* was not "the government" but rather

the Commissioner, that is, the IRS itself, just as the IRS waived the defense in this case.

The Federal Circuit's view of the waiver doctrine also cannot be reconciled with this Court's prior decisions. One case in point is *Kales*. While the Federal Circuit discussed *Kales* only in the context of the "informal claim" doctrine (App. 12, 13), this Court explicitly addressed the subject of waiver in *Kales*. *See* 314 U.S. at 196-97. The taxpayer in that case had filed a defective refund claim a few weeks before the limitations period expired and did not file a formal refund claim until more than three years later. In addition to treating the formal claim as an amendment to the original filing, the Court looked to "the consistent administrative treatment" of both the original claim and the later amendment, including specifically the receipt and holding of the amendment for seven years, in concluding that "this entire course of departmental action . . . was a waiver" of the defects in the original filing. *Id.*

The Federal Circuit's decision is similarly inconsistent with the so-called "general claim" cases cited in its opinion, such as *Memphis Cotton Oil*. *See* App. 21-24. While the Federal Circuit put the general claim cases in a different category from cases of waiver, the point of those cases is that a general claim constitutes "inadequate compliance" with the requirements in the regulations governing refund claims and "[b]eyond doubt" could be rejected by the IRS on that basis. *Memphis Cotton Oil Co.*, 288 U.S. at 67. Moreover, the IRS can terminate the taxpayer's ability to cure the defects in the original claim by rejecting the claim. *See id.* at 72. As a result, the IRS's failure to reject a general claim is itself nothing more than an ongoing waiver, lasting as long as the IRS chooses, "irrespective of a limitation running in the interval." *Factors & Finance Co.*, 288 U.S. at 93.

For the same reason, the Federal Circuit's decision is contrary to case law allowing a pending refund claim to be amended after the limitations period if the amendment is germane to the original claim. Unlike the original filings in the general claim cases, the original filings in the amendment cases complied with the requirements in Reg. § 301.6402-2(b)(1) in setting out a specific ground for the refund being claimed. Those filings, however, did not set out the ground on which the taxpayer ultimately obtained relief, any more than the ones in the general claim cases did. As indicated by the Federal Circuit's own discussion of that case law, the amendment is timely in those circumstances only if it is submitted before "the original claim has either been allowed or disallowed by the IRS." App. 28.

As a result, the IRS's failure to act on the original claim has the effect of an ongoing waiver that opens the door for the submission of claims that would otherwise be barred as untimely. Conversely, the acceptance of an amendment to a pending claim is itself simply another form of waiver. *See, e.g., Weihman v. United States*, 4 F. Supp. 155, 157 (E.D. Pa. 1933) (acceptance of a submission raising a new ground for refund after the limitations period had expired could be viewed "equally well" as either a waiver of the defects in the original filing or an amendment to that filing); *see also Angelus Milling Co.*, 325 U.S. at 298 (characterizing *Weihman* as a waiver case).

The waiver aspect of the amendment case law is particularly apparent in *Pink*, one of the leading cases on the amendment of pending refund claims. In *Pink*, the original refund claim submitted by the taxpayer had been rejected by the IRS before the amendment was filed. As a result, the original claim "could not [have been] the subject of a valid amendment when the second claim was filed." *Pink*, 105 F.2d at 187. The Second Circuit nevertheless

allowed the amendment because the "status [of the original claim] as an existing and amendable claim" was subsequently "restored" when the IRS reopened and allowed the original claim. *Id.* (citing *Memphis Cotton Oil Co.*, 288 U.S. at 72). Even though the court did not explicitly characterize the reopening of the claim as a "waiver," it held that conduct by the IRS after the limitations period had run could in fact validate a claim that would otherwise be subject to rejection. The Federal Circuit's reasoning and conclusion on the waiver issue conflict with that holding. App. 18.

In elevating an incomplete compliance with the Treasury Regulations to a violation of the statute of limitations, the Federal Circuit failed to recognize the "sharp" line of division that "must be kept" between the requirement in Section 7422(a) of the Code that there must be a timely filing of a claim by the taxpayer and the requirements in "a regulation making provision as to form," such as Reg. § 301.6402-2(b)(1). *Memphis Cotton Oil Co.*, 288 U.S. at 71.[6] The former is jurisdictional and cannot be waived or otherwise excused. *See, e.g., Brockamp.* In this case, however, Computervision did "what Congress has explicitly commanded" – and all that Congress has explicitly commanded – when it filed its original, timely refund claim. *Angelus Milling Co.*, 325 U.S. at 297. Where, as here, the IRS did not insist upon the formal requirements in Reg. § 301.6402-2(b)(1) in its own consideration of that claim, the Federal Circuit "ma[de] an empty abstraction, and not a practical safeguard," of the regulation by raising a "technical objection[]" after the

[6] The regulation at issue in *Memphis Cotton Oil* differed to some extent from the current version of the regulation, which was adopted in 1929. *See Memphis Cotton Oil*, 288 U.S. at 66 n.1. The later regulation, however, is merely "different in form" from the earlier one. *Id.*

Commissioner himself had already "investigated the merits of a claim and taken action upon it." *Id.* at 297.

B. The Case Law Cited by the Federal Circuit Does Not Justify Adopting a New Rule Conflicting with Existing Precedent.

Apart from the cursory dismissal of *Schenley* and the excess profits tax cases, the Federal Circuit opinion does not discuss any of the case law cited above in the context of its decision regarding the time limit on waivers by the IRS. To support its position, the Federal Circuit instead quoted passages from two cases and then added a bare citation to a third. *See* App. 18-19 (quoting *United States v. Garbutt Oil Co.*, 302 U.S. 528 (1938), and *Sicanoff Vegetable Oil Corp. v. United States*, 149 Ct. Cl. 278, 181 F. Supp. 265 (1960), and citing *Melchior v. United States*, 136 Ct. Cl. 483, 145 F. Supp. 193 (1956)). *Melchior*, however, involved a completely different issue: Unlike Computervision, the taxpayer in *Melchior* never filed any sort of timely refund claim for the year at issue in that case.

Kales disposes of the court's reliance on the other two cases it cited in this context, *Garbutt* and *Sicanoff*. In *Kales*, this Court in fact cited its own prior decision in *Garbutt* in the very same passage in which the Court found a waiver based upon actions taken by the IRS after the statute of limitations had already run. *See* 314 U.S. at 197. Given the Court's treatment of the case in *Kales*, *Garbutt* cannot mean what the Federal Circuit thought it meant. The controlling factor in *Garbutt* was not the timing of the waiver claimed by the taxpayer but rather the type of waiver the taxpayer was seeking.

Unlike Computervision, the taxpayer in *Garbutt* had completely abandoned its original refund claim, leaving no claim at all for the IRS to act on. *See Garbutt Oil Co.*, 302

U.S. at 530-31; *see also id.* at 532 (explaining the decision in *Prentiss* as due to the abandonment of the taxpayer's original claim and assertion of a ground that "was totally inconsistent with and involved a negation of that specified in the [original] claim"). As the Court indicated in *Angelus Milling*, the taxpayer in *Garbutt* was accordingly seeking a waiver of "what Congress has explicitly commanded," that is, the filing of a timely refund claim, not a waiver of the specificity requirements in Reg. § 301.6402-2(b)(1). 325 U.S. at 296 (citing *Garbutt*, *inter alia*, as relating the restriction on waiver to the filing of a timely refund claim required by Congress).

The situation was essentially the same in *Sicanoff*, the other case the Federal Circuit relied on. In that case, the taxpayer's original claim was effectively disposed of in separate litigation before the Tax Court. *See Sicanoff*, 145 F. Supp. at 268. Because the taxpayer's original claim "became untenable" when it prevailed in the Tax Court litigation (*id.*), there was no claim left for the IRS to act on. As in *Garbutt*, the taxpayer was claiming there had been a waiver of the requirement of filing a refund claim, not a waiver of any issue regarding the contents of that claim.

After quoting *Garbutt* and *Sicanoff*, the Federal Circuit sought to bolster its decision on this point by citing this Court's decisions in *Brockamp* and *Richmond*. According to the Federal Circuit, *Brockamp* requires a restrictive approach to the waiver issue in this case. *See* App. 20. Going beyond that, the court suggested that *Brockamp* "calls into question the continuing viability of the waiver/estoppel strand of the informal claim doctrine," even though the defendant never made such an argument and the parties never briefed the issue. App. 20 n.12 (quoting *PALA, Inc. v. United States*, 234 F.3d 873, 880 n.37 (5th Cir. 2000)). In citing *Richmond* as holding that "conduct of

a government agent could not estop the government from denying benefits not otherwise permitted by law," the court similarly suggested that the IRS does not have the ability to waive its own regulatory requirements that was recognized implicitly in *Memphis Cotton Oil* and explicitly in subsequent cases such as *Kales* and *Angelus Milling*. App. 20 (quoting *Richmond*, 496 U.S. at 434).

The Federal Circuit's view of *Brockamp* was mistaken because that case, like *Melchior* and like *PALA* itself, involved a different issue – the consequences of a taxpayer's failure to comply with the requirement in Section 7422(a) that there must be a timely refund claim. In all three of those cases, there was no timely filing at all, as Section 7422(a) specifically requires. The same is true of *BCS Financial Corporation v. United States*, 118 F.3d 522, 526 (7th Cir. 1997), the other case cited by the Federal Circuit in the same footnote in which it quoted *PALA*. The court's reliance on *Brockamp* suffers from the same defect as its reliance elsewhere on *BCS*, *PALA*, and *Melchior*, as well as its reliance on *Garbutt*: The Federal Circuit failed to recognize or give effect to the distinction that Justice Frankfurter drew in *Angelus Milling* between the "explicit statutory requirements" established by Congress that "are beyond the dispensing power of Treasury officials" and the regulatory requirements regarding the form and contents of a refund claim that *can* be waived by the IRS. *Angelus Milling Co.*, 325 U.S. at 296.

The court's citation to *Richmond* suffers from the same defect. In suggesting that the passage it quoted from *Richmond* is applicable here, the Federal Circuit begged the question of when a tax refund is "not otherwise permitted by law," App. 20 (quoting *Richmond*, 496 U.S. at 434). Under the controlling case law, a refund is not permitted when a taxpayer has failed to do "what Congress has explicitly commanded," by filing a timely refund

claim. *Angelus Milling Co.*, 325 U.S. at 296. That is simply not the case when the issue is instead compliance with the requirements in Reg. § 301.6402-2(b)(1).

The courts in *BCS*, *PALA*, and *Melchior* in fact made the very distinction that the Federal Circuit failed to make here. On the same page of the opinion in *PALA* from which the Federal Circuit quoted (App. 20 n.12), the Fifth Circuit noted explicitly that "[t]he requirements imposed by Treasury regulations must be distinguished from those imposed by statute; the former requirements may be waived while the latter may not." *PALA*, 234 F.3d at 880 n.40 (quoting *Missouri Pacific R.R. Co. v. United States*, 558 F.2d 596, 599 (Ct. Cl. 1977)). The Seventh Circuit pointed out the same distinction in *BCS*. *See* 118 F.3d at 524-25. So did the Court of Claims in *Melchior*. *See* 145 F. Supp. at 194 (referring to the inability of the IRS to waive the statutory requirement of filing a timely claim "as distinguished from [a regulatory requirement] which might be waived under certain circumstances").

That distinction has in fact been part of the controlling case law since it was first emphasized by Justice Cardozo in 1933. *See Memphis Cotton Oil Co.*, 288 U.S. at 71 (the "line of division" between the statute and the regulatory requirements "must be kept a sharp one"). The Federal Circuit was wrong to ignore it and to treat the regulatory requirements in Reg. § 301.6402-2(b)(1) as if they were instead part of "what Congress has explicitly commanded." *Angelus Milling Co.*, 325 U.S. at 296. Moreover, the court's unwarranted suggestion that this Court has overruled prior case law dating back to *Memphis Cotton Oil*, if not further, without ever saying so, highlights the need for this Court to clarify what its decisions in this area actually mean.

II. THE FEDERAL CIRCUIT'S TREATMENT OF THE AMENDMENT TO COMPUTERVISION'S PENDING REFUND CLAIMS CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

In addition to the waiver by the IRS, Computervision relied in the proceedings below on its amendment of its original, timely, and pending refund claim. To the extent the issue of interest suspension was not already in the case, Computervision effectively amended its refund claim to include that issue when it requested a netting of interest. *See* App. 154-59. Computervision made that request while the IRS was still considering its original claim in computing the interest resulting from the Tax Court's decision in favor of Computervision on the DISC qualification issue. The IRS responded to the request by including interest suspension as one of the "normal . . . considerations" involved in the computation of interest. Int. Rev. Man. § 20.2.8.9.1(1)(A); App. 160-63. Computervision later supplemented that request through a formal amendment of the refund claim. *See* App. 7, 151.

The ability of a taxpayer to amend a refund claim after the limitations period has expired was recognized by this Court in *Memphis Cotton Oil* and *Factors & Finance Co.* As the Federal Circuit noted, such amendments are subject to two requirements. *See* App. 27-29. First, the amendment must be submitted while the original claim is still pending before the IRS. *See Memphis Cotton Oil Co.*, 288 U.S. at 72 (if "the claim had been finally rejected and the proceeding thereby ended . . . [the amendment] was too late"); *Factors & Finance Co.*, 288 U.S. at 93 ("In *Memphis Cotton Oil*, this Court established that a taxpayer can amend a defective refund claim as long as the amendment is submitted prior to 'final rejection' of the original, defective claim by the IRS"). Second, if the

original claim was specific rather than general, the amendment must be "germane" to the original claim. *United States v. Andrews*, 302 U.S. 517, 524 (1939). While correctly noting those requirements, the Federal Circuit departed from the decisions of other Circuit Courts of Appeals in applying both of them.

A. As the Federal Circuit Acknowledged, Its Decision Conflicts with Decisions of the Second Circuit and Eleventh Circuit Regarding the Amendment of Refund Claims.

Under the first of the applicable requirements, an amendment to a refund claim must be submitted while the claim is still pending before the IRS. As the Federal Circuit itself described that requirement, an amendment is ineffective "if filed after the original claim has either been allowed or disallowed by the IRS." App. 28. Instead of actually applying that rule, however, the Federal Circuit applied a different rule that "necessarily" followed: The Federal Circuit held that the IRS "lost jurisdiction" over Computervision's refund claim when Computervision filed its complaint in the Court of Federal Claims, even though the IRS itself had neither allowed nor disallowed the claim at that point. App. 5, 29.

Like the Court of Federal Claims, the Federal Circuit grounded that conclusion on an executive order from 1933 that provides for litigation involving the government to be handled by the Department of Justice. *See* App. 29 & n.18 (quoting, in part, Exec. Order No. 6166), 101-02 & n.26. That view of the effect of the executive order, however, is directly contrary to the decision in *St. Joseph Lead*, the only case that has considered the matter. In *St. Joseph Lead*, both the district court and the Second Circuit squarely addressed the same issue presented in this case

and reached the opposite conclusion. The Federal Circuit's decision also directly conflicts with the decision of the Eleventh Circuit in *Mutual Assurance, Inc. v. United States*, 56 F.3d 1353 (1995), which allowed a taxpayer to amend its refund claim after the IRS had acted on the claim and thereby, in the view of the Federal Circuit, "lost jurisdiction." App. 29.

Like Computervision, the taxpayer in *St. Joseph Lead* filed a complaint after the IRS failed to act on its original refund claim within six months. As here, the attorneys handling that litigation at the Department of Justice sought assistance from the IRS in evaluating the merits of the taxpayer's claim. As here, the taxpayer subsequently amended its claim to include computational errors identified by the IRS that had not been included in the original claim. The circumstances in *St. Joseph Lead* were thus identical to the ones presented here when the government, in that case, advanced the same view of Executive Order No. 6166 that the Federal Circuit and the Court of Federal Claims relied on in this case.

Unlike the Federal Circuit and the Court of Federal Claims, the district court rejected that view in *St. Joseph Lead*. The district court held that the amendment to the refund claim in *St. Joseph Lead* was timely because "it remain[ed] apparent that . . . the plaintiff's case was being treated as if it were still in the administrative stage," despite the filing of the taxpayer's complaint. *St. Joseph Lead Co. v. United States*, 190 F. Supp. 637, 641 (S.D.N.Y. 1960); *cf. Henderson Clay Products*, 324 F.2d at 17 (reaching a similar result in a waiver case). In doing so, the district court correctly followed the lead of this Court in cases dating back to *Memphis Cotton Oil* by "keep[ing] in view the realities of administrative practice." *Memphis Cotton Oil Co.*, 288 U.S. at 69; *see also United States v.*

Andrews, 302 U.S. at 526 (similarly looking to "the necessities and realities of administrative procedure" in resolving the issue in that case).

The district court also pointed out that the Department of Justice had itself requested the further investigation of the taxpayer's claim by the IRS, just as it did here. As a result, "[t]his course of action created neither prejudice nor misunderstanding for either side." *St. Joseph Lead*, 190 F. Supp. at 641. For the same reason, the allowance of the amendment "did [not] impinge in any way upon the allocation of responsibility embodied in the Executive Order." *Id.* On appeal, the Second Circuit went even further and dismissed the government's reliance on Executive Order No. 6166 and its accompanying objection to the amendment as "completely without merit." *St. Joseph Lead*, 299 F.2d at 351.

The Federal Circuit explicitly acknowledged that its decision in this case was in conflict with *St. Joseph Lead*. App. 29. It made no attempt, however, to address either the facts or the reasoning in that case. Rather than addressing the case on the merits, the court simply lumped *St. Joseph Lead* together with *Mutual Assurance* as adverse authority that was not binding in the Federal Circuit. It then rejected both *St. Joseph Lead* and *Mutual Assurance*, based on the supposedly contrary authority of *Union Pacific Railroad Co. v. United States*, 389 F.2d 437 (Ct. Cl. 1968). *See* App. 29-30.

Although the Federal Circuit was correct in recognizing the conflict between *Union Pacific* and *Mutual Assurance* (and the conflict between *Mutual Assurance* and its decision in this case), it was wrong in concluding that *Union Pacific* controlled this case. Both *Union Pacific* and *Mutual Assurance* involved the ability of a taxpayer to amend a refund claim after the IRS had fully disposed of the original claim by granting the refund requested by the

taxpayer. Neither of those cases addresses the question of whether the IRS similarly "los[es] jurisdiction" over a taxpayer's refund claim (App. 29) when the taxpayer files a complaint *before* the IRS has acted on the original claim.

The Federal Circuit's conclusion that the IRS had lost jurisdiction over Computervision's claim was instead based solely on Executive Order No. 6166. In relying on the Executive Order for that conclusion, the Federal Circuit created a conflict with the Second Circuit's decision in *St. Joseph Lead* and upset law that had been settled for over forty years.

B. The Federal Circuit Misstated and Misapplied the Germaneness Requirement for Amendments to Pending Refund Claims as Enunciated in *Pink* and as Applied by Other Circuits.

The Federal Circuit's alternative holding on the amendment to Computervision's refund claim related to the substance of the claim. The court rejected the amendment because it "did not merely claim an identical amount under a different theory." App. 27. According to the Federal Circuit, the amendment was not "germane" to the original claim because it "claimed a different amount under a different theory" that was not a "necessary step" in the computation Computervision had originally requested. App. 27. In reaching that conclusion, the court both misstated what the germaneness doctrine requires and misapplied that doctrine to the facts in this case.

The germaneness requirement applies when a taxpayer files a specific claim for a refund rather than a general claim like the one involved in *Memphis Cotton Oil*. *See United States v. Andrews*, 302 U.S. at 524. Although this Court established that requirement in *Andrews*, the

Second Circuit's decision in *Pink* is usually viewed as the leading case on what the germaneness requirement entails. When the Federal Circuit's predecessor adopted the rule, for example, it did so by specific reference to "the statement of the rule which was set out in" *Pink*. *Addressograph*, 78 F. Supp. at 121; *see also* App. 26 (citing *Addressograph* as the source of the rule in the Federal Circuit).

As demonstrated by the situation in *Pink*, the "rule" that was "set out" in that case is *not* limited to the situations described in the Federal Circuit's own formulation here. In fact, the original refund claim in *Pink* requested a computation that could not have been simpler: The taxpayer merely claimed that the tax should have been computed at a lower rate because it qualified as an insurance company. *See Pink*, 105 F.2d at 185. The only "necessary step" in the computation required by that claim was the multiplication of the taxpayer's reported income by a different rate. App. 27. The Second Circuit, however, allowed a further refund based on a recomputation of the taxpayer's taxable income, even though the original claim had not raised any issue at all regarding that computation. *See Pink*, 105 F.2d at 186-87. Thus, under the rule actually applied in *Pink*, the taxpayer obtained what the rule formulated by the Federal Circuit would specifically disallow: "a different amount under a different theory." App. 27.

The Federal Circuit's own quotations from *Pink* and *Addressograph* show that the rule that was set out in *Pink* was not the one the court applied in this case. Under those cases, the application of the germaneness requirement instead involves looking to the "facts upon which the amendment is based." App. 26 n.16 (quoting *United States v. Ideal Basic Industries, Inc.*, 404 F.2d 122, 124 (10th Cir.

1968), and *Pink*, 105 F.2d at 187); *see also id.* at 26 (quoting *Addressograph*, 78 F. Supp. at 122-23). The question is whether the IRS would have looked at those facts in considering the taxpayer's original claim, not the amount or nature of the claim or the type of computation requested by the taxpayer. *See* App. 27.

The Second Circuit in fact could not have been more explicit in that regard. *See Pink*, 105 F.2d at 187 ("Whether a new ground of recovery may be introduced after the statute has run by amending a pending claim filed in time *depends upon the facts which an investigation of the original claim would disclose*" (emphasis added)). Like the Court of Claims in *Addressograph*, other appellate courts have understood *Pink* in exactly the same way. *See, e.g., Ideal Basic Industries,* 404 F.2d at 124; *Mutual Assur., Inc.*, 56 F.3d at 1357. The Federal Circuit even acknowledged that point earlier in its opinion, although it added the inaccurate gloss that the IRS must examine the facts prior to the running of the statute of limitations. *See* App. 24; *contra Pink*, 105 F.2d at 185 (recomputation of income considered only after running of limitations period and filing of amended claim).

Under *Pink* and the other cases applying the rule for "germaneness" set out in that case, the validity of Computervision's amendment depends on whether the facts that would have been disclosed in an examination of Computervision's original claim would point to the issue of interest suspension. The critical facts in that regard were the overpayment reported on Computervision's return and the election on the return to credit that overpayment to the subsequent year. Those facts are the only ones necessary to determine that interest suspension was an issue in the case and, under *Addressograph* and *Pink*, all that is needed is that the IRS would look at those facts in examining Computervision's refund claim.

Contrary to the panel's characterization, those critical facts did not simply exist "somewhere under the Commissioner's roof." App. 27 (quoting *Angelus Milling Co.*, 325 U.S. 293, 299 (1945)). Even ignoring the specific requirements in the IRS manual, discussed above at pages 6-7, those items were among the first things the IRS needed to look at in examining Computervision's original claim, and those items were in fact examined when the IRS on its own initiative prepared computations reflecting a suspension of interest. As paraphrased by the Federal Circuit, Computervision's claim related to "the deficiency interest paid with respect to the DISC deficiency" or "the interest attributable to the DISC deficiency." App. 9, 27.[7] The "DISC deficiency," however, was not simply the amount of tax relating to the DISC qualification issue, as the court seemingly assumed. The *deficiency* was the amount of tax that had not been paid as of the original due date of the return.

The facts shown on the return itself – specifically including the overpayment and Computervision's election to credit that overpayment to the subsequent year – were part of the basic facts necessary for determining whether or in what amount there actually was a deficiency on which interest could accrue, and those are the basic facts that are relevant to the interest suspension computation dispute here. The Federal Circuit's decision that Computervision's amendment was not germane created a conflict with the rule set out in *Pink*, as applied by the Second Circuit in that case and by other Circuit Courts of Appeals.

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[7] The actual refund claim referred to "the portion of the interest paid that is attributable to the disqualification of [CVI] as a DISC." App. 138.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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445 F.3d 1355

United States Court of Appeals for the Federal Circuit

05-5014

COMPUTERVISION CORPORATION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

John S. Brown, Bingham McCutchen LLP, of Boston, Massachusetts, argued for plaintiff-appellant. With him on the brief were *George P. Mair, Donald-Bruce Abrams* and *Matthew D. Schnall*.

Bruce R. Ellisen, Attorney, Tax Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were *Eileen J. O'Connor*, Assistant Attorney General; *Richard T. Morrison*, Deputy Assistant Attorney General; and *Gilbert S. Rothenberg* and *Francesca U. Tamami*, Attorneys.

Appealed from: United States Court of Federal Claims

Judge Marian Blank Horn

DECIDED: April 20, 2006

Before NEWMAN, RADER, and DYK, *Circuit Judges*.

DYK, *Circuit Judge*.

Computervision Corporation ("Computervision") appeals the decision of the United States Court of Federal Claims which held that Computervision is not entitled to a refund of deficiency interest assessed and paid with respect to its 1982 tax year. The court granted the United States' motion to dismiss on the ground that the statute of limitations barred an interest suspension claim because the plaintiff failed to file a claim with the Internal Revenue Service ("IRS") until more than 10 years after the expiration of the two year limitation period of 26 U.S.C. § 6511(a). The court also held that an interest netting claim failed to state a claim because the requirements of 26 U.S.C. § 6621(d) were not met under our decision in *Federal National Mortgage Ass'n v. United States,* 379 F.3d 1303 (Fed. Cir. 2004). We affirm.

BACKGROUND

The facts of this case are not in dispute. On September 14, 1983, Computervision, a manufacturer of computer-aided manufacturing products, overpaid its tax liability shown on its 1982 return by $4,750,231, and elected to apply this overpayment to its 1983 tax year.[1] On September 17, 1984, Computervision overpaid the amount of taxes shown on the 1983 return by $7,329,276, and again elected to apply this overpayment to the following year, the 1984 tax year. Finally, on July 2, 1985, Computervision filed a return for the 1984 tax year showing an overpayment of $7,166,031, and requested a refund of the

[1] Under 26 U.S.C. § 6402(b), the IRS permits a corporate taxpayer that has overpaid its liability in one year to claim a credit for the overpayment against its estimated taxes for the succeeding year. 26 U.S.C. § 6402(b) (2000).

entire amount. The IRS paid the refund, without interest, on August 2, 1985.

Following an audit, the IRS issued an "examination report" on January 7, 1986, in which it asserted that the taxpayer's 1982 return had understated its tax liability and proposed a deficiency of $6,224,982 for the 1982 tax year. A portion of this deficiency resulted from the IRS's determination that a subsidiary of Computervision, Computervision International, Inc. (CVI), did not qualify as a domestic international sales corporation, or DISC, during the 1983 tax year. *See* 26 U.S.C. § 992(a)(1) (1982).[2] Another portion of the deficiency concerned what we refer to as non-DISC issues.

On April 11, 1986, Computervision submitted a protest regarding the IRS's position with respect to the 1982 tax year to the Boston Appeals Office of the IRS, disputing among other issues the determination that CVI was not a DISC. The non-DISC issues in the examination report were resolved by an agreement that the tax liability relating to the non-DISC issues was $2,215,952.[3] The IRS proposed a total 1982 tax deficiency of $7,886,409. Of that amount, $5,670,457 was attributable to the DISC issue, and $2,215,952 to non-DISC issues.

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[2] The DISC provisions allow a domestic production company to establish a DISC to handle its export sales and leases. The DISC itself is not subject to tax on its earnings. 26 U.S.C. § 991 (2000). Instead, a portion of the DISC's earnings is taxed to the DISC's shareholders as a constructive dividend, 26 U.S.C. § 995(b)(1), and the remaining income is not taxed to the shareholders until distributed. 26 U.S.C. § 995; *see Dow Corning Corp. v. United States*, 984 F.2d 416, 417 (Fed. Cir. 1993).

[3] Apparently, this amount was later revised by agreement to $2,102,421.

A 1985 net operating loss carryback eliminated all of the proposed 1982 deficiency (except for a deficiency of $37,776 attributable to investment tax credit recapture). However, the carryback did not eliminate Computervision's liability for interest which had accrued on the 1982 deficiency. On June 3, 1988, the IRS assessed Computervision deficiency interest totaling $4,095,974.42, plus tax in the amount of $37,776. After corrections, the $4,095,974 interest assessment was revised to $4,063,073. Importantly for purposes of this appeal, the $4,063,073 interest assessment included (1) interest in the amount of $2,808,888 attributable to the still-disputed DISC qualification issue, and (2) interest in the amount of $1,254,186 attributable to the resolved non-DISC issues. The IRS computed the deficiency interest based on the entire 1982 deficiency amount, from the due date of the 1982 return to the due date of the 1985 return (when the NOL carryback offset the deficiency). Computervision paid the $37,776 tax deficiency on March 7, 1989. Computervision eventually also paid the deficiency interest claimed by the IRS, with the final payment of $4,045,011.64 occurring on April 28, 1989.

The statute bars suit for recovery of the deficiency interest unless "a claim for refund . . . has been duly filed with the [IRS]. . . ." 26 U.S.C. § 7422(a) (2000). A claim is timely filed if filed "within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever . . . expires the later. . . ." 26 U.S.C. § 6511(a). Within two years of the final payment, on August 4, 1989, Computervision filed a refund claim with the IRS (the "original refund claim"), in which it claimed "that portion of the interest relating to the [DISC] disqualification issue" for the 1982 tax year. The refund claim specifically

requested $2,808,888, the amount of interest assessed by the IRS on the DISC tax liability. The refund claim also included a boilerplate provision stating that:

> Computervision claims as a basis for the refund of the interest paid with respect to its 1982 taxable year such other grounds as are shown to be appropriate by the tax returns, books and records and the Examination Report and related Protest of Computervision and [CVI] for their respective tax years ended December 31, 1982, and January 31, 1983.

J.A. at 1228.

Section 6532 allows the taxpayer to commence suit six months after filing a refund claim if the IRS fails to disallow the claim during that time. 26 U.S.C. § 6532(a). By April 4, 1990, the IRS had not acted on the matter, so Computervision filed a complaint in the Court of Federal Claims. The complaint alleged that "Computervision is aggrieved by the defendant's failure to refund the interest attributable to the purported disqualification of [CVI] as a DISC."

Meanwhile, on November 4, 1993, Computervision filed a petition in the United States Tax Court disputing deficiencies that were assessed for two different tax years, 1983 and 1984 – primarily on the theory that the IRS had improperly denied DISC treatment for those years. Proceedings in the Court of Federal Claims relating to the 1982 tax year interest assessment were stayed pending the resolution of the DISC issue by the Tax Court, apparently on the theory that the DISC determination for the 1983 and 1984 tax years would also resolve the issue for the 1982 tax year. On March 18, 1996, the Tax Court ruled

in Computervision's favor on the DISC issue, holding that CVI qualified as a DISC. *Computervision Int'l Corp. v. Comm'r,* 71 T.C.M. (CCH) 2450 (1996). The Tax Court's decision on the DISC issue became final on May 25, 1998.[4]

Following the resolution of the DISC issue by the Tax Court, the Court of Federal Claims lifted its stay with respect to the 1982 tax year proceedings on June 22, 1998. Computervision and the Department of Justice ("DOJ") engaged in settlement negotiations relating to the 1982 DISC issue. On July 22, 1998, Congress enacted a new provision of 26 U.S.C. § 6621, requiring interest netting, that is, requiring the IRS to "apply a zero net interest rate to overlapping periods of mutual indebtedness between a taxpayer and the IRS." *Fed. Nat. Mortgage Ass. v. United States,* 379 F.3d 1303, 1306 (2004) (describing 26 U.S.C. § 6621(d)). In May 2, 2000, letters to both DOJ and the IRS, Computervision claimed the right to a refund of non-DISC interest based on the theory of interest netting under 6621(d). Computervision did not in these letters assert a claim for interest suspension. The IRS replied on August 17, 2000, treating the claim as including an interest suspension claim for 1982. Specifically, the IRS's August 17 letter stated "Revenue ruling 99-40 (Sequa) [interest suspension] is applied regarding the credit elect [from the 1982 tax year] to 1983. No claim is necessary." J.A. at 1405. The DOJ sent a letter on October 25, 2000, stating that the DOJ was "not in agreement [with the IRS computations suggesting] that an additional refund or overpayment can be allowed in the instant litigation – over and above that negotiated on the basis of the issues

[4] The Tax Court proceeding remains pending with respect to certain computational issues.

in suit – based upon Revenue Ruling 99-40 *absent the filing of a timely claim for refund raising the issue.*" J.A. at 1428 (emphasis in original). In a March 14, 2002, letter, the DOJ reiterated its position and stated that "we do not believe that a timely claim for refund has been filed on [the interest suspension] issue." J.A. at 1430. Computervision filed a formal amendment with the IRS on April 4, 2002, in which it claimed non-DISC interest under the interest suspension theory.

On July 9, 2003, Computervision filed an amended complaint in the Court of Federal Claims, claiming $820,946.13 in deficiency interest relating to non-DISC issues on theories of interest suspension and interest netting.

The government contended that the interest suspension claim was barred by the statute of limitations. Unlike the DISC interest claim, which involved a challenge to the underlying tax liability, the claim for interest suspension did not involve any challenge to the underlying deficiencies asserted with respect to the non-DISC issues. Rather, the taxpayer contended that, even though the underlying tax liability had been properly determined with respect to non-DISC issues, interest was not owed. The taxpayer relied on the principle of interest suspension, which derives from 26 U.S.C. § 6601(a), and was formally set out in Revenue Ruling 99-40, published on October 4, 1999, more than three years earlier. 1999-2 C.B. 441. Section 6601(a) requires the payment of interest by the taxpayer with respect to "any amount of tax [that] . . . is not paid on or before the last date prescribed for payment," and provides that "interest on such amount . . . shall be paid for the period from such last date to the date paid." Revenue Ruling 99-40 addressed "the manner in which interest

on a subsequently determined deficiency is computed under § 6601(a) when the taxpayer makes an election to apply an overpayment to the succeeding year's estimated taxes." *Id.*

Under Revenue Ruling 99-40, interest suspension applies when (a) a taxpayer elects to credit an overpayment reported on the return for year one [here 1982] to year two [here 1983]; (b) a deficiency is subsequently determined for year one [1982]; and (c) the credit elect to year two is not "needed" to satisfy the required payments of estimated tax for year two [1983]. Rev. Rul. 99-40. Under these circumstances, interest is suspended relating to the deficiency for year one [1982]. Here, in other words, the taxpayer asserted that deficiency interest was not owed for 1982 because the tax for that year had been overpaid, and that the credit-elect transferring that payment to the 1983 tax year should be ignored for purposes of computing interest. Similarly, taxpayer's credit elect from 1983 to 1984 was not needed to pay its 1984 liability, because the 1984 taxes had also been overpaid.[5]

As part of the 2003 amended complaint, the taxpayer asserted an alternative theory for recovery of the non-DISC interest based on a theory of interest netting. "Interest netting" is set forth in 26 U.S.C. § 6621(d), which provides that the IRS applies a net interest rate of zero to overlapping underpayments and overpayments of tax. With respect to interest netting there is a different limitations issue (described below), but there is no issue as to

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[5] The interest suspension theory is described in our decision in *Marsh & McLennan Cos., Inc. v. United States*, 302 F.3d 1369, 1378 (Fed. Cir. 2002).

whether the claim itself was timely filed with the IRS because the statute provides for retroactive relief if the statutory conditions are satisfied. *See* 26 U.S.C. § 6621(d), Pub. L. No. 105-206, § 3301(c)(2), 112 Stat. 741 (1998), as amended. The parties agree that interest netting provides identical relief as interest suspension.

On September 9, 2004, the Court of Federal Claims rendered a final decision. *Computervision Corp. v. United States,* 62 Fed. Cl. 299 (2004). By agreement of the parties, the Court of Federal Claims awarded judgment in favor of the taxpayer in the amount of $2,997,761.42, representing the deficiency interest paid with respect to the DISC deficiency.[6] *Id.* at 332. However, the Court of Federal Claims granted the government's motion to dismiss the taxpayer's claim for a refund of deficiency interest on the non-DISC deficiencies. It held that the interest suspension claim was barred by the statute of limitations because a claim was not filed with the IRS within two years of the date of payment as required by 26 U.S.C. § 6511(a). *Id.* at 328-29. It also held that Computervision failed to state a claim for interest-netting under section 6621(d). *Id.* at 332. Section 6621(d) only applies to overlapping periods when underpayment interest is "payable" and overpayment interest is "allowable." The court held that interest is not "allowable" on an overpayment credited to a succeeding year's estimated tax, nor on an overpayment refunded within 45 days. Computervision's 1982 and 1983 overpayments were credited to succeeding years, and its 1984 overpayment was refunded within 45 days, so it failed to

[6] There is a slight discrepancy between the award of $2,997,761.42 and Computervision's original claim of $2,808,888.

meet the requirements of section 6621(d). *See id.* at 331-32.

The taxpayer timely appealed, and we have jurisdiction pursuant to 26 U.S.C. § 1295(a)(3).

DISCUSSION

I

We first address the statute of limitations issue with respect to Computervision's interest suspension claim.

Statutes of limitations play an important role in tax administration, benefiting both the government and taxpayers. The government's authority to assess taxes is limited by 26 U.S.C. § 6501, under which taxes must be assessed within three years of the filing of the return. 26 U.S.C. § 6501 (2000). Similarly, the taxpayer must file its refund claim with the IRS "within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever . . . expires the later. . . ." 26 U.S.C. § 6511(a).[7] Here the taxpayer's original claim for refund was filed with the IRS within the limitations period because it was filed on August 4, 1989, within two years of the date of the last payment, April 28, 1989. However, that claim did not specifically include the interest suspension claim with respect to the non-DISC issues. A formal claim with the IRS was not filed until April 4, 2002, more than

[7] The taxpayer may file suit for refund after "the expiration of 6 months from the date of filing the claim . . . unless the Secretary renders a decision thereon within that time," and must file the suit within "2 years from the date of mailing . . . to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates." 26 U.S.C. § 6532(a)(1).

10 years after the limitations period had expired. Nonetheless, the taxpayer claims that for a variety of reasons the claim was timely.

Understanding the taxpayer's contentions requires a description of the overall regulatory scheme. Section 7422(a) of the Internal Revenue Code bars a taxpayer from filing a suit for refund "until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." 26 U.S.C. § 7422(a) (2000). The Secretary by regulation requires that claims for refund "*set forth in detail each ground* upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." 26 C.F.R. § 301.6402-2(b)(1) (2005) (emphasis added). Earlier regulations contained similar provisions. *See, e.g., United States v. Kales,* 314 U.S. 186, 193 (1941) (citing Article 1306 of Treasury Regulation 65, promulgated under the 1924 Revenue Act); *U.S. Pipe & Foundry, Co. v. United States,* 155 F. Supp. 231, 232 (Ct. Cl. 1957) (citing Regs. 111, sec. 29.322-3).

The requirement for filing a proper refund claim "is designed both to prevent surprise and to give adequate notice to the Service of the nature of the claim and the specific facts upon which it is predicated, thereby permitting an administrative investigation and determination." *Alexander Proudfoot Co. v. United States,* 454 F.2d 1379, 1383 (Ct. Cl. 1972) (quoting *Union Pac. R.R. v. United States,* 389 F.2d 437, 442 (Ct. Cl. 1968), *cert denied,* 395 U.S. 944 (1969)). This requirement for claim specificity applies equally to claims for deficiency interest which are separate from claims for the underlying tax liability. *John*

B. Lamert & Assocs. Inc. v. United States, 212 Ct. Cl. 71, 1986 WL 22198, at *10 (1976).

The Supreme Court has held that in some circumstances a taxpayer's claim is not barred by the statute of limitations even though the taxpayer did not timely file the formal, detailed claim required by the regulations. *See, e.g., Kales,* 314 U.S. at 196-97; *United States v. Andrews,* 302 U.S. 517, 524 (1938); *United States v. Memphis Cotton Oil Co.,* 288 U.S. 62, 70-71 (1933); *Tucker v. Alexander,* 275 U.S. 228, 231 (1927). Unfortunately in implementing the Supreme Court's decisions the language used to describe these exceptions has not always been uniform in courts outside of this circuit.

In this circuit this aggregation of rules has come to be known as the substantial variance doctrine. *See Lockheed Martin Corp. v. United States,* 210 F.3d 1366, 1371 (Fed. Cir. 2000); *see also Western Co. of N. Am. v. United States,* 323 F.3d 1024, 1034 (Fed. Cir. 2003); *Union Pac. R.R.,* 389 F.2d at 442-47; *Armstrong Rubber Co. v. United States,* 207 Ct. Cl. 1023, 1975 WL 3232, at *1 (1975). The doctrine permits consideration of a claim for refund despite failure to timely file detailed formal claims with the IRS when a substantial variance from the requirements of the regulation is not involved.[8] But this doctrine applies only in four limited situations. Each of these has itself come to be identified as a separate doctrine.

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[8] In many cases, the issue is whether there is a substantial variance from a timely filed claim. *See Lockheed,* 210 F.3d 1366, 1371 (Fed. Cir. 2000) (holding that taxpayer may not "present[ ] claims in a tax refund suit that 'substantially vary' the legal theories and factual bases set forth in the tax refund claim presented to the IRS").

A

First, formal compliance with the statute and regulations is excused when the informal claim doctrine is applicable. Under the informal claim doctrine, a timely claim with purely formal defects is permissible if it fairly apprises the IRS of the basis for the claim within the limitations period.

The informal claim doctrine is best described in the Supreme Court's decision in *Kales,* 314 U.S. 186. There within the limitations period the taxpayer submitted an informal letter claiming a refund of tax. The letter did not comply with the IRS's regulations because it was not filed on the correct form. The taxpayer later filed an untimely amendment that complied with the regulations. The Supreme Court held that "a [timely] notice fairly advising the Commissioner of the nature of the taxpayer's claim . . . will nevertheless be treated as a[n effective] claim, where formal defects . . . have been remedied by amendment filed after the lapse of the statutory period." *Id.* at 194.

The informal claim doctrine is well recognized in other circuits.[9] We and our predecessor court, the Court of

[9] *See Kaffenberger v. United States,* 314 F.3d 944, 954-957 (8th Cir. 2003) (upholding jury verdict permitting untimely amendment to informal claim, where informal claim had been filed on "Automatic Extension Request" Form 4868, rather than Form 1040, and the IRS was on notice of claim because the "information held by the IRS described the refund sought with sufficient particularity to allow the IRS to investigate the claim"); *PALA, Inc. v. United States,* 234 F.3d 873, 877-79 (5th Cir. 2000) (holding that "an informal claim is sufficient if it is filed within the statutory period, puts the IRS on notice that the taxpayer believes an erroneous tax has been assessed, and describes the tax and year with sufficient particularity to allow the IRS to undertake an investigation") (citing *Kales,* 314 U.S. at 194); *BCS Fin. Corp. v. United States,* 118 F.3d 522, 524-25 (7th Cir. 1997) (citing

(Continued on following page)

Claims, have specifically applied the doctrine. *See, e.g., Arch Eng. Co., Inc. v. United States,* 783 F.2d 190, 192 (Fed. Cir. 1986); *Barenfeld v. United States,* 442 F.2d 371, 374 (Ct. Cl. 1971); *Stuart v. United States,* 130 F. Supp. 386, 388-90 (Ct. Cl. 1955); *Am. Radiator & Standard Sanitary Corp. v. United States,* 318 F.2d 915, 920-22 (Ct. Cl. 1963).

In *American Radiator* the Court of Claims held that "[i]nformal refund claims have long been held valid" when they "have a written component ... [and] adequately apprise the Internal Revenue Service that a refund is sought and for certain years." 318 F.2d at 920 (citing *Kales,* 314 U.S. 186). The Court of Claims found that the taxpayer filed an informal claim by writing "various notations and figures" on its timely filed income tax return. *Id.*; *see also Newton v. United States,* 163 F. Supp. 614, 619-20 (Ct. Cl. 1958) (finding informal refund claim based on written protests prior to payment); *Night Hawk Leasing Co. v. United States,* 18 F. Supp. 938, 941-42 (Ct. Cl. 1937) (finding informal refund claim based on objection on the back of a check paying the tax).

In *Western Co. of North America v. United States,* 323 F.3d 1024 (Fed. Cir. 2003), we recognized that the doctrine applies in circumstances in which the taxpayer's action involved a request for information. *Western Co.,* 323 F.3d

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Kales, 314 U.S. at 194); *United States v. Commercial Nat'l Bank of Peoria,* 874 F.2d 1165, 1170-76 (7th Cir. 1989) (permitting untimely amendment where taxpayers' attorney wrote a letter to IRS within limitations period, contesting the IRS's calculations); *see also generally Martin v. United States,* 833 F.2d 655, 660, 662-63 (7th Cir. 1987); Michael I. Saltzman, *IRS Practice and Procedure* ¶ 11.08[2] (2d student ed. 1991) ("IRS Prac. & Proc.").

at 1035. The IRS mistakenly assessed the taxpayer a "failure-to-file" ("FTF") penalty. *Id.*; *see also Western Co. of N. Am. v. United States,* 52 Fed. Cl. 51, 54 (2002). The taxpayer, unaware of what had caused this penalty, repeatedly requested information about the basis for the penalty but did not file a formal claim for a refund. The IRS documented this request in writing. 323 F.3d at 1035. We held that the substantial variance doctrine did not bar the taxpayer's refund claim because, during the limitations period, Western had "repeated[ly] request[ed] . . . information that would have allowed filing of an informed claim," and thereby "put the IRS on notice of its challenges to [the] false assessment." *Id.* at 1034-35.

The informal claim doctrine is of no assistance to the taxpayer here. Computervision's original complaint was formal, and contained no specific suggestion that non-DISC interest was in dispute. The complaint simply alleged that "Computervision is aggrieved by the defendant's failure to refund the interest attributable to the purported disqualification of [CVI] as a DISC." There was no further communication from Computervision to the IRS during the limitations period suggesting that Computervision was asserting a claim for non-DISC interest. As the Court of Federal Claims found, "the original claim could not reasonably provide notice to the IRS of [the interest suspension claims]." *Computervision,* 62 Fed. Cl. at 324. Thus, Computervision's refund claim was not a valid informal claim.

B

A second exception exists known as the waiver doctrine. If the taxpayer files a timely formal claim but fails

to include the specific claim for relief, the claim may nonetheless be considered timely if the IRS considers that specific claim within the limitations period. The IRS's consideration of the specific claim is held to be a waiver of the requirement of the regulation that the refund claim "set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." 26 C.F.R. § 301.6402-2(b)(1).

The Supreme Court recognized the waiver doctrine in *Memphis Cotton,* 288 U.S. 62, and *Angelus Milling Co. v. Commissioner,* 325 U.S. 293 (1945). In *Memphis Cotton,* the Supreme Court found a waiver where (during investigation of the taxpayer's original claim and within the limitations period) the Commissioner discovered that the taxpayer was entitled to a refund on a specific ground, and notified the taxpayer that a refund would be made. 288 U.S. at 65, 73. After the limitations period expired, the Commissioner reversed its position and refused to grant the refund. The taxpayer then filed an amendment asserting its right to a refund. *Id.* at 65-66. The Court held that the amendment was timely because "[l]ong before the amendment the Commissioner had ascertained the facts and had even notified the taxpayer of the justice of its claims and of the ruling of the Bureau that adjustments would be made accordingly." *Id.* at 73.

In *Angelus Milling,* the Court held that the claim was untimely but stated that a waiver might be found where "[t]he evidence [is] clear that the Commissioner understood the specific claim that was made even though there was a departure from form in its submission," and "[t]he showing [is] unmistakable that the Commissioner has in fact seen fit to dispense with [the] formal requirements

and to examine the merits of the claim." 325 U.S. at 297; *see, e.g., United States v. Garbutt Oil,* 302 U.S. 528, 533 (1938) ("[W]hile the Commissioner might have enforced the regulation and rejected a claim for failure to comply with it in omitting to state with particularity the grounds on which the claim was based, he was not bound to do so, but might waive the requirement of the regulation and consider a general claim on its merits.").

Various other courts and authorities have also recognized the waiver doctrine.[10] Our predecessor court also recognized the doctrine. In *Consolidated Coppermines Corp. v. United States,* 296 F.2d 743, 744 (Ct. Cl. 1961), the Court of Claims held that a claim could be filed outside the limitations period if it raised a ground that the IRS had discovered, within the limitations period, during investigation of the original claim. The court found that "the amendment [filed outside the limitations period] merely made more definite the matters already within the knowledge of the Commissioner, which in the course of his investigation he actually did ascertain." 296 F.2d at 744 (Ct. Cl. 1961) (internal quotations and citations omitted); *see U.S. Pipe & Foundry,* 155 F. Supp. 231, 232-34 (Ct. Cl. 1957) ("[W]here the Commissioner determines and applies newly discovered or different grounds in computing the [taxpayer's liability] . . . [he] is precluded from thereafter denying the refund because the claim was incompatible with his regulations. . . ."); *Nat'l Forge & Ordnance Co. v. United States,* 151 F. Supp. 937, 941 (Ct. Cl. 1957) (allowing

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[10] *See, e.g., BCS Fin.,* 118 F.3d at 525-26; *Herrington v. United States,* 416 F.2d 1029, 1032 (10th Cir. 1969); IRS Prac. & Proc. ¶ 11.09[5]; Gerald A. Kafka & Rita A. Cavanagh, *Litigation of Federal Civil Tax Controversies* ¶ 16.02[1] (2d ed. 1997 & supp. 2005).

taxpayer to assert a claim in court where "the claim for refund was sufficient to cause the Commissioner to consider the matters which are the basis of the present suit"); *see also Union Pac. R.R.*, 389 F.2d at 442 (recognizing that "an item raised in litigation but not specifically adverted to in the [original] claim might be permitted if it is found that . . . the Commissioner considered that unspecified ground in reaching his decision on the items for which a refund was requested").

The central purpose of the waiver doctrine is "to prevent IRS agents from lulling taxpayers into missing the [limitations] deadline. . . ." *BCS Fin.*, 118 F.3d at 526; *PALA*, 234 F.3d at 880 (quoting *BCS Fin.*, 118 F.3d at 526). Where the taxpayer learns, within the limitations period, that the IRS has addressed the merits of a particular ground, and thus fails to file a timely formal claim raising that ground, the taxpayer's claim is not barred.

However, we agree with the Court of Federal Claims that the IRS cannot waive the requirements of its regulations by conduct outside of the limitations period. *See Computervision*, 62 Fed. Cl. at 327. In *Garbutt Oil*, the Commissioner considered the merits of a claim for a tax refund after the limitations period had expired. 302 U.S. at 533. The argument was that the Commissioner had waived the requirements of the regulation. The Court held that the claim was not timely, reasoning that "no officer of the government has power to waive the statute of limitations . . . " *Id.* at 534. This conclusion follows from the statute itself. Even the erroneous allowance of a refund that is barred by the statute of limitations cannot prevent the government from recovering that allowance. Section 7405 allows the government to bring suit to recover an "erroneous" refund. 26 U.S.C. § 7405(a) & (b). Section 6514

provides that a refund is "erroneous" if it is made after the expiration of the limitations period and no timely claim was filed. 26 U.S.C. § 6514(a)(1).

Our predecessor court has similarly held that a waiver may not occur after the limitations period expires. In *Sicanoff Vegetable Oil Corp. v. United States,* 181 F. Supp. 265 (Ct. Cl. 1960), the Court of Claims refused to find a waiver where the taxpayer filed timely claim asserting one ground, the limitations period expired, and the Commissioner then by mistake considered a different second ground. The taxpayer filed an untimely amendment asserting the second ground. *Id.* at 268. The court held that the Commissioner "was not permitted by law to pay such a claim, and his consideration of it could not enlarge his legal authority." *Id.* at 268-69; *see also Melchior v. United States,* 145 F. Supp. 193, 194 (Ct. Cl. 1956).

The taxpayer relies on a few Excess Profits Tax cases decided in other jurisdictions for the proposition that the requirements of what is now 26 C.F.R § 301.6402-2(b)(1) may be waived after the statute of limitations has expired. *See Dale Distrib. Co. v. Comm'r,* 269 F.2d 444 (2d Cir. 1959); *Eisenstadt Mfg. Co. v. Comm'r,* 28 T.C. 221 (1957); *Martin Weiner Corp. v. Comm'r,* 26 T.C. 128 (1956).[11] Many of those cases involved special regulations under the Excess Profits provisions that imposed unusually detailed

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[11] The taxpayer also relies on *Schenley Indus., Inc. v. Comm'r,* 42 T.C. 129 (1964). There the Tax Court held that the IRS "waived" the specificity requirement by failing to timely raise the variance defense during litigation. *Id.* at 170; *see also Tucker v. Alexander,* 275 U.S. 228, 230-31 (1927). The issue in the present case is not whether the government can waive the variance defense through inaction during litigation, but rather whether it can waive the defense through administrative action.

claim requirements. *See Eisenstadt,* 28 T.C. at 231-32; *Dale,* 269 F.2d at 445. Those decisions are not binding on this court, and are inconsistent with *Garbutt Oil* and *Sicanoff* if they are viewed as allowing a waiver after the limitations period. Moreover, as other circuits have recognized,[12] expanding the scope of the waiver doctrine as the taxpayer urges would appear to be inconsistent with more recent Supreme Court authority holding that actions of regulatory authorities cannot either extend the statute of limitations under section 6511 by equitable tolling or create an estoppel against the government. *See Brockamp,* 519 U.S. 347, 352 (holding that equitable tolling does not apply to toll section 6511); *Office of Pers. Mgmt. v. Richmond,* 496 U.S. 414, 434 (1990) (holding that conduct of a government agent could not estop the government from denying benefits not otherwise permitted by law). The taxpayer has not called our attention to any post-*Brockamp* or *Richmond* decisions in other jurisdictions that have applied the waiver doctrine to actions by the IRS taking place after the running of the limitations period.[13]

Here there is no contention that the IRS considered the taxpayer's claim for non-DISC interest within the limitations period. Rather Computervision contends that

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[12] *See BCS Fin.,* 118 F.3d at 525 (noting that the exceptions are in tension with *United States v. Brockamp,* 519 U.S. 347 (1997), and other Supreme Court authority); *PALA,* 234 F.3d at 880 n.37 ("We share the Seventh Circuit's concern that the Supreme Court's decision in [*Brockamp*] calls into question the continuing viability of the waiver/estoppel strand of the informal claim doctrine.").

[13] *But cf. Kaffenberger,* 314 F.3d 944, 953 (8th Cir. 2003) (holding that explicit waiver authorized under § 6501 allows the IRS and the taxpayer to agree to extend the assessment period after statute of limitations expires).

the IRS waived the specificity requirement nine years after the limitations period expired in an August 17, 2000, letter from the IRS to Computervision that included a set of interest computations applying interest suspension to the non-DISC interest. The letter also stated that "Revenue ruling 99-40 (Sequa) [interest suspension] is applied regarding the credit elect to 1983. No claim is necessary." J.A. at 1405. Computervision cannot benefit from the waiver doctrine because the IRS consideration occurred long after the expiration of the limitations period.

C

A third exception, which we refer to as the general claim doctrine, exists where (1) the taxpayer has filed a formal general claim within the limitations period; and (2) an amendment is filed outside the limitations period that makes the general claim more specific. The Supreme Court described this exception in *United States v. Andrews*, 302 U.S. 517, 524 (1938):

> Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, has not misled him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within his knowledge, or which, in the course of his investigation, he would naturally have ascertained, is permissible.

The Supreme Court thus recognized that an amendment making a general claim more specific may be permissible even when filed outside the limitations period.

The Supreme Court applied the general claim doctrine in *United States v. Factors & Fin. Co.*, 288 U.S. 89 (1933). There the IRS performed an audit of the taxpayer, but the audit was incomplete when the statute of limitations expired. In order to preserve any claims resulting from the audit, the taxpayer filed a general claim before the limitations period expired requesting a refund of all the taxes it had paid. The claim did not set forth any specific ground, and explained that its purpose was "to permit the Commissioner to refund to deponent any excess paid over taxes actually found to be due." *Id.* at 91. The Court held that the taxpayer's subsequent amendment was not barred by the statute of limitations. *Id.* at 96. "[A] general claim for refund, not specifying grounds, is subject to amendment until final rejection irrespective of a limitation running in the interval." *Id.* at 93 (citing *Memphis Cotton Oil,* 288 U.S. 62). Similarly, in *Memphis Cotton* the Court held that an amendment to a general claim, filed outside the limitations period, was timely where the original claim merely stated the amount of the tax paid, the correct tax and the amount of overpayment, but did not specify the facts or reasons justifying a refund. 288 U.S. at 64-65, 71.

Our predecessor court recognized the general claim doctrine in at least one case, *Cochran v. United States,* 62 F. Supp. 872, 872 (Ct. Cl. 1945), where the court permitted an untimely amendment to a general claim that requested refunds relating to "losses not claimed." The court held that the amendment "perfected and made specific" the original general ground. *Id.* at 875.

However, the general claim doctrine only applies when the original claim is general rather than specific. In *United States v. Henry Prentiss & Co.*, 288 U.S. 73 (1933), the Supreme Court held that where the original timely

claim asserted a specific ground, it could not be amended out of time to claim a new basis for relief unrelated to the original claim. *Id.* at 83. Likewise in *Andrews* the Court found that an amendment to a claim raising a specific ground was untimely because "[t]he very specification of the items of complaint would tend to confine the investigation to those items and there is no evidence that the examination was more extended." 302 U.S. at 525.

Here Computervision's original claim was not general but specific. It contained a specific request for DISC-related interest which claimed "the portion of the interest paid that is attributable to the [DISC disqualification issue]."[14] J.A. at 1225.

To be sure the original 1989 claim included a secondary, general claim. The general claim was a boilerplate provision stating:

> Computervision claims as a basis for the refund of the interest paid with respect to its 1982 taxable year such other grounds as are shown to be appropriate by the tax returns, books and records and the Examination Report and related Protest of Computervision and [CVI] for their respective tax years ended December 31, 1982, and January 31, 1983.

J.A. at 1228. In *Andrews* the Supreme Court rejected the argument that the general claim doctrine was applicable under such circumstances. As here, the taxpayer's claim in *Andrews* "not only called for redress of a specified

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[14] Computervision's original claim also included an "alternative" claim regarding the computation of the so called "DISC Commission" paid by Computervision to CVI.

grievance but demanded general relief as well." 302 U.S. at 525. The Court held that the taxpayer's amendment was barred by the statute of limitations, reasoning that "[t]he very specification of the items of complaint would tend to confine the investigation to those items and there is no evidence that the examination was more extended." *Id.* at 526. Thus Computervision's untimely claim for non-DISC interest does not meet the requirements of the general claim doctrine.[15]

D

Where the general claim doctrine is inapplicable because the original claim was not general but specific, a related doctrine, the germaneness doctrine, may allow relief. This fourth exception only applies where the taxpayer (1) files a formal claim within the limitations period making a specific claim; and (2) after the limitations period but, while the IRS still has jurisdiction over the claim, files a formal amendment raising a new legal theory – not specifically raised in the original claim – that is "germane" to the original claim, that is, it depends upon facts that the IRS examined or should have examined within the statutory period while determining the merits of the original claim. Unlike the waiver doctrine, the inquiry here is not whether the particular legal *theory* for recovery has been considered by the IRS during the limitations period but whether the underlying *facts* supporting that legal theory were discovered or should

[15] In any event, as discussed immediately below, the amendment had to be filed while the IRS still had jurisdiction over the claim, and the IRS no longer had jurisdiction once the taxpayer filed the refund suit.

have been discovered by the IRS in considering the original claim during the limitations period.

The Supreme Court recognized this exception in *Bemis Brothers Bag Co. v. United States* 289 U.S. 28 (1933). In *Bemis,* the taxpayer filed a timely claim for a refund with the Commissioner, arguing that the Commissioner should allow a so-called "special assessment" for determining "invested capital" for excess profits tax purposes because invested capital could not be calculated with precision. *Id.* at 31. To support this claim, the taxpayer urged that the precise values of certain items could not be ascertained. The Commissioner denied the claim. After the limitations period expired but before the refund suit was filed, the taxpayer filed an amendment specifically urging that the items should be included in invested capital because they could be calculated, and that the tax should be recalculated on that basis. *Id.* at 31-32. Thus, the taxpayer's amendment did not require inquiry into a new set of facts, but simply adapted the form of relief to the facts which would have to be examined during investigation of the original claim. The Court held that "the claim as amended does not differ in matter of substance from the claim as first presented," because "[i]f the [Commissioner] found that there had been omissions, but that he was able to his own satisfaction to identify and appraise them, he would learn in the process that there had been an undervaluation of invested capital, and that the assessment of the tax was correspondingly erroneous." *Id.* at 35.

This doctrine also was described in the Supreme Court's decision in *Andrews.* There, in addition to holding that the general claim was inadequate because it was accompanied by a specific claim, the court held the specific

claim was inadequate because it was not "germane" to the later asserted ground. *Andrews,* 302 U.S. at 524.

Other circuits have also recognized this exception.[16] Our predecessor court has also recognized this doctrine. In *Addressograph,* for example, the Court of Claims held that an amendment filed outside the limitations period was "proper and germane" because investigation of the merits of the original claim "would have necessarily involved a consideration of [the facts the amendment depended on]." *Addressograph-Multigraph Corp. v. United States,* 78 F. Supp. 111, 122-23 (Ct. Cl. 1948). The amendment "merely made more definite the matters already within the knowledge of the Commissioner, which in the course of his investigation he actually did ascertain." *Id.* Similarly, in *Consolidated Coppermines* the court observed that "[w]here the amendment is inconsistent with the former claim, or has injected new and unrelated matter, we have not allowed it, but where it is germane to the original claim and sets up matter discovered in the course of the

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[16] *See, e.g., United States v. Ideal Basic Indus., Inc.,* 404 F.2d 122, 124 (10th Cir. 1968) (permitting amendment where " 'facts upon which the amendment is based would necessarily have been ascertained by the commissioner in determining the merits of the original claim' " (quoting *Pink v. United States,* 105 F.2d 183, 187 (2d Cir. 1939)); *Pink,* 105 F.2d 183, 187 (citing *Bemis Bros. Bag,* 289 U.S. 28); *see also United States v. Henderson Clay Prods.,* 324 F.2d 7, 18 (5th Cir. 1963) (limitations requirement satisfied for refund claim based on erroneous computation of depletion deduction where amended claim "assert[ed] no other ground for recovery than its original" because "[b]oth are based upon 114(b)(4)(B), and the amended complaint merely takes account of a definitive construction of that subsection which was handed down between the date of the claims and the date of trial."); 113 *Am. Law Reports* 1291 sec. II(e) (1938 & supp. 2006); 15 *Mertens Law of Federal Income Taxation* § 58:38 (1991 & supp. 2006).

investigation of the original one, we have allowed it." 296 F.2d at 745.

Here Computervision's interest suspension claim as to non-DISC issues cannot benefit from the germaneness doctrine for two separate reasons. First, the amended claim was not in fact germane to the original claim. The original claim did not merely claim an identical amount under a different theory. It claimed a different amount under a different theory. Moreover, as the Court of Federal Claims concluded, "the interest suspension relief that plaintiff is seeking is not a necessary step in completing the interest computation that was explicitly placed at issue in the Original Refund Claim. . . ." *Computervision,* 62 Fed. Cl. at 319 (internal quotation marks omitted). The IRS did not discover the interest suspension claim as a result of its investigation of the original claim, but rather as a result of Computervision's May 2, 2000, letter raising the interest netting issue. Indeed, Computervision admitted that even as of late 1999, it was unaware that an interest suspension claim was available. The IRS consideration of the claim "was simply a mistake." *Id.* at 321 n.24. The determination of the interest attributable to the DISC deficiency did not require the IRS to compute non-DISC interest under the interest suspension theory. Even if the IRS possessed the facts necessary to make this computation, "it is not enough that somewhere under the Commissioner's roof is the information which might enable him to pass on a claim for refund." *Angelus Milling,* 325 U.S. at 299 (rejecting argument that a taxpayer's refund claim, together with the refund claim of another

taxpayer, supplied the IRS with the information needed to determine the merits of an untimely claim).[17]

Second, as the Court of Federal Claims held here, the formal amendment was itself filed too late. *Computervision,* 62 Fed. Cl. at 328-29. The formal amendment, if filed after the expiration of the limitations period, must be filed while the original claim is still being considered by the IRS. This requirement "is designed both to prevent surprise and to [permit] . . . an administrative investigation and determination." *Union Pacific R.R.,* 389 F.2d at 442. Thus an amendment is ineffective if filed after the original claim has either been allowed or disallowed by the IRS. For example, in *Union Pacific,* the Court of Claims concluded that "[t]he disposition of a taxpayer's refund claim by *allowance* of the amount requested in full, however, precludes an amendment asserting an additional amount after the expiration of the statutory period for refund." *Id.* at 447 (emphasis added). So too in *Allstate Insurance Co. v. United States*, the Court of Claims held that "[i]t is a rule of long standing that once a refund claim has been *disallowed,* it is not subject to amendment." 550 F.2d 629, 633 (emphasis added); *see also* 15 *Mertens Law of Federal Income Taxation* § 58:38 ("Although amendments to a properly filed claim can be made even though the statutory period for filing a claim has expired, the amendment must be germane, and must be presented before the original claim is resolved."); *Memphis Cotton,* 288 U.S. at

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[17] *See also Andrews,* 302 U.S. at 524 ("[A] claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim.").

72 (observing that if "at the time of [the] amendment the claim had been finally rejected," then "the proceeding [had] thereby ended" and the amendment "was too late").

The same rule necessarily applies where the taxpayer elects to terminate the IRS's jurisdiction by filing a suit for refund. While the taxpayer has the right to file a refund suit if the IRS has not acted on the claim for six months, the IRS's jurisdiction over the claim necessarily terminates on the date a refund suit is filed. *See* Exec. Order No. 6166, § 5 (June 10, 1933), *reprinted in* 5 U.S.C. § 901 (2000).[18] The IRS no longer has the authority to resolve the claim, and therefore is without power to "allow" or "disallow" it.

We recognize that, as the taxpayer urges, two of our sister circuits have adopted a different rule, holding that an amendment is effective for purposes of the germaneness doctrine after the IRS has lost jurisdiction over the claim. *Mutual Assurance Inc. v. United States,* 56 F.3d 1353 (11th Cir. 1995); *St. Joseph Lead Co. v. United States,* 299 F.2d 348 (2d Cir. 1962) (finding amendment filed after commencement of suit was timely). Thus, for example, the Eleventh Circuit in *Mutual Assurance* quoted the Court of

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[18] Section 5 of Executive Order 6166 is entitled "Claims By or Against the United States," and reads as follows:

> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

Exec. Order No. 6166, § 5 (June 10, 1933), *reprinted in* 5 U.S.C. § 901 (2000); *see also Computervision,* 62 Fed. Cl. at 326 n.26 (citing Exec. Order No. 6166, § 5).

Claims' decision in *Union Pacific* holding that the amendment could not be filed after the allowance of the original claim, but held that "[*Union Pacific*] is not binding precedent in this circuit." *Mutual Assurance,* 56 F.3d at 1357. Unlike the Eleventh Circuit we are, of course, bound by the precedent of the Court of Claims. *S. Corp. v. United States,* 690 F.2d 1368, 1369 (Fed. Cir. 1982) (*en banc*) (the Federal Circuit is bound by decisions of the Court of Claims "announced before the close of business on September 30, 1982").

In any event it seems to us that the Court of Federal Claims was correct here in suggesting the rule adopted by our sister circuits in *St. Joseph Lead* and *Mutual Assurance* is untenable since it would allow amendments submitted after filing the refund suit to extend the limitations period indefinitely. *Computervision,* 62 Fed. Cl. at 328-29. Here Computervision filed its original refund suit in the Court of Federal Claims on April 4, 1990, and then filed an amendment with the IRS on April 4, 2002, in which it claimed non-DISC interest under the interest suspension theory. Computervision's amendment in 2002, 12 years after filing suit and after the IRS's jurisdiction had been terminated by the filing of the refund suit, came too late.

Thus this exception does not apply to Computervision's claim.

E

For the foregoing reasons, Computervision's interest suspension claim must fail. There was no informal claim, and the waiver, general claim and germaneness doctrines are also inapplicable.

II

The taxpayer also asserts that it was entitled to recovery of the non-DISC interest under the theory of interest netting.

Under section 6621(d), the IRS applies a net interest rate of zero to overlapping underpayments and overpayments of tax. Section 6621(d), enacted on July 22, 1998, provides:

> Elimination of interest on overlapping periods of tax overpayments and underpayments. – To the extent that, for any period, interest is payable under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the same taxpayer of tax imposed by this title, the net rate of interest under this section on such amounts shall be zero for such period.

26 U.S.C. § 6621(d) (2000). Computervision argues that its overpayment for the 1982 year, which arose on March 15, 1983, the due date of its 1982 return, should be netted against the subsequently determined underpayment for 1982. Although the 1982 overpayment was credited towards subsequent years, it was not needed to pay liability for those years. Thus, according to Computervision, the overpayment retained its status as a 1982 overpayment until August 2, 1985, when it was finally refunded.

The government does not claim that the taxpayer's failure to file the claim within the limitations period is a bar, because the interest netting statute provides for retroactive relief under certain circumstances. However, the government asserts that the doctrine is inapplicable for a number of reasons. We need to address only one

because we agree with the government that under our decision in *Federal National Mortgage Association v. United States,* 379 F.3d 1303 (Fed. Cir. 2004) (*"FNMA"*), the taxpayer has failed to satisfy the requirement for retroactive application of the statute.

The interest Computervision contests arose prior to the enactment of section 6621(d). Section 6621(d) applies retroactively only under certain circumstances.[19] Specifically, section 6621(d) is "[s]ubject to any applicable statute of limitation not having expired with regard to either a tax underpayment or a tax overpayment" as of July 22, 1998. Pub. L. No. 105-277, § 4002(d), 112 Stat. 2681 (1998), *amending* Pub. L. No. 105-206, § 3301(c)(2), 112 Stat. 741 (1998). In *FNMA*, we interpreted this language to require that the statute of limitations must be open with respect to both the underpayment and the overpayment.

A claim for a refund of paid underpayment interest is barred if not filed within the later of three years from the date the return was filed or two years from the date the interest was paid. 26 U.S.C. § 6511. The underpayment interest in this case is the 1982 deficiency interest, which was paid on April 28, 1989. The limitations period for the underpayment closed two years later, on April 28, 1991 – several years before the July 22, 1998, date specified in section 3301(c)(2).

A claim for interest from overpayments must be filed within six years after the due date of the return that gave rise to the overpayment interest. *See* 28 U.S.C. § 2401

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[19] The requirements for retroactive application of interest netting are explained in Revenue Procedure 99-43. Rev. Proc. 99-43, 1999-2 C.B. 579.

(2000). In Computervision's case, the overpayment limitations periods expired on March 15, 1989, for the 1982 tax year; March 15, 1990, for the 1983 tax year; and August 2, 1991, for the 1984 tax year. All these periods were closed as of the July 22, 1998, critical date specified in § 3301(c)(2). Computervision's argument that the limitations periods remained open indefinitely while its DISC claim was being litigated is without merit.

Thus, as of July 22, 1998, the statute of limitations was closed with respect to both underpayment and overpayment interest, and thus Computervision's claim for interest netting fails to satisfy the requirements for retroactive application of the statute.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Federal Claims is *AFFIRMED*.

COSTS

No costs.

2006 WL 2505690

United States Court of Appeals
for the Federal Circuit

05-5014

COMPUTERVISION CORPORATION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

John S. Brown, Bingham McCutchen LLP, of Boston, Massachusetts, argued for plaintiff-appellant. With him on the brief were *George P. Mair*, *Donald-Bruce Abrams* and *Matthew D. Schnall*.

Bruce R. Ellisen, Attorney, Tax Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were *Eileen J. O'Connor*, Assistant Attorney General; *Richard T. Morrison*, Deputy Assistant Attorney General; and *Gilbert S. Rothenberg* and *Francesca U. Tamami*, Attorneys.

Appealed from: United States Court of Federal Claims

Judge Marian Blank Horn

DECIDED: August 30, 2006

SUPPLEMENTAL OPINION ON
PETITION FOR REHEARING

Before NEWMAN, RADER, DYK, *Circuit Judges*.

PER CURIAM.

Computervision Corporation ("Computervision") petitions for rehearing en banc. The government by letter requests that we correct an error in our original opinion. We reaffirm our earlier decision affirming the decision of the United States Court of Federal Claims, in which we denied Computervision's claims for interest suspension and interest netting. *Computervision Corp. v. United States,* 445 F.3d 1355 (Fed. Cir. 2006).

In its petition for rehearing, Computervision challenges our denial of its interest suspension claim on several grounds, but does not seek rehearing on the interest netting issue. However, in a May 25, 2006, letter, the government informed us that the interest netting portion of our opinion contained an apparent error, due largely to an error in the government's brief.

In our original decision, we held that Computervision failed to satisfy the requirement for retroactive application of the interest netting statute because under our decision in *Federal National Mortgage Association v. United States,* 379 F.3d 1303, 1311 (Fed. Cir. 2004) ("FNMA"), the statute applies retroactively only if the statute of limitations is open with respect to both the underpayment and overpayment.

With respect to the underpayment interest limitations period based on representations contained in the government's brief, our opinion stated:

> A claim for a refund of paid underpayment interest is barred if not filed within the later of three years from the date the return was filed or two years from the date the interest was paid. 26 U.S.C. § 6511. The underpayment interest in this

> case is the 1982 deficiency interest, which was paid on April 28, 1989. The limitations period for the underpayment closed two years later, on April 28, 1991. . . .

Computervision, 445 F.3d at 1373-74.

With respect to the overpayment interest limitation period, we stated:

> A claim for interest from overpayments must be filed within six years after the due date of the return that gave rise to the overpayment interest. *See* 28 U.S.C. § 2401 (2000). In Computervision's case, the overpayment limitations periods expired on March 15, 1989, for the 1982 tax year; March 15, 1990, for the 1983 tax year; and August 2, 1991, for the 1984 tax year.

Computervision, 445 F.3d at 1374. The government states that the overpayment portion of the opinion is not correct and suggests revising it to read as follows:

> A suit for interest from overpayments must be filed within six years after the date on which the refund or credit of the overpayment was allowed, *i.e.,* the date on which the IRS authorized the scheduling of an overassessment. *See* 28 U.S.C. § 2401 (2000); 26 U.S.C. § 6407; *Barnes v. United States,* 133 Ct. Cl. 546, 548-49, 137 F.Supp. 716, 718-19 (1956); *General Instrument Corp. v. United States,* 33 Fed. Cl. 4, 8 (1995); Rev. Rul. 56-506, 1956-2 C.B. 959; Rev. Proc. 99-43, § 4.02(2), 1999-2 C.B. 579. In Computervision's case, the overpayment limitations periods expired on October 24, 1989, for the 1982 tax year; November 5, 1990, for the 1983 tax year; and August 2, 1991, for the 1984 tax year. All these

> periods were closed as of the July 22, 1998, critical date specified in § 3301(c)(2).

Government's Letter of Counsel at 1-2 (May 25, 2006).

In a June 9, 2006, letter, we invited Computervision to respond to the government's proposed revision. In response, Computervision urged that the government's proposed revision was based on "unsupported factual assumptions," because the record does not contain the documents necessary to ascertain "the date on which the IRS authorized the scheduling of an overassessment." Computervision's Response at 1 (June 14, 2006).

We need not resolve the question of when the overpayment limitations periods expired, because under our decision in *FNMA,* both the overpayment and underpayment limitations period must remain open on July 22, 1998, in order for the interest netting statute to apply retroactively. *See FNMA,* 379 F.3d at 1311. Our earlier opinion concluded that the limitations period on Computervision's claim for underpayment interest expired on April 28, 1991, long before the July 22, 1998, critical date specified in section 3301(c)(2).[1] Nothing in the government's letter calls that conclusion into question.

However, Computervision also contends that the applicable statute of limitations as to both overpayments and underpayments remains open within the meaning of the statute while a lawsuit is pending before the Tax Court or the Court of Federal Claims. Computervision's

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[1] A claim for credit or refund of paid underpayment interest is barred if not filed within the later of three years from the date the return was filed or two years from the date the interest was paid. 26 U.S.C. § 6511 (2000).

Response at 2 (June 14, 2006). This issue was not raised in Computervision's petition for rehearing. In any event, we rejected this argument in our original decision, and we see no reason to revisit it. *See Computervision,* 445 F.3d at 1374.

Computervision's other contentions with respect to our decision on the interest suspension claim are without merit. Accordingly, Computervision's petition for rehearing is *denied.*

62 Fed. Cl. 299

In the United States Court of Federal Claims

Case No. 90-284T
FILED: September 9, 2004

* * * * * * * * * * * *	**Tax Refund Claim; Statute of Limitations, 26 U.S.C. § 6511(a); Requirement to File an Administrative Claim Prior to Bringing Suit, 26 U.S.C. § 7422(a); Specificity of Administrative Refund Claims, 26 C.F.R. § 301.6402-2(b)(1); Variance Between Administrative Claim and Claim Before the Court; Amendments to Refund Claims; Interest Suspension, Rev. Rul. 99-40; Global Interest Netting, 26 U.S.C. § 6621(d).**
COMPUTERVISION CORPORATION,	
Plaintiff,	
v.	
UNITED STATES,	
Defendant.	
* * * * * * * * * * * *	

JOHN S. BROWN, GEORGE P. MAIR, DONALD-BRUCE ABRAMS, and **MATTHEW D. SCHNALL,** Bingham McCutchen LLP, Boston, Massachusetts, for the plaintiff.

ELLEN C. SPECKER, Tax Division; **MILDRED L. SEIDMAN,** Chief, Court of Federal Claims Section; and **EILEEN J. O'CONNOR,** Assistant Attorney General, United States Department of Justice, Washington, D.C., for the defendant.

OPINION

HORN, J.

In this tax case, both parties to this action agree that plaintiff Computervision Corporation is entitled to a refund of deficiency interest assessed and paid with respect to its 1982 tax year, but disagree as to the amount properly refundable to plaintiff. Computervision is seeking a refund of $3,818,707.55 in deficiency interest assessed and paid with respect to its 1982 tax year. Defendant believes plaintiff is entitled to a lesser amount of $2,997,761.42 in deficiency interest based upon a decision of the United States Tax Court in a related case.

In the present suit, plaintiff claims it is entitled to the greater amount of deficiency interest based on the principles of interest suspension and/or interest netting. Specifically, plaintiff contends that interest on its 1982 tax deficiency should be suspended from March 15, 1983 through August 2, 1985. Additionally, to the extent that interest is not suspended, plaintiff asserts that a net interest rate of zero, pursuant to 26 U.S.C. § 6621(d), should be applied to the periods during which its 1982 tax deficiency was offset by overpayments for its 1983 and 1984 tax years. *See* 26 U.S.C. § 6621(d) (2000) (hereinafter § 6621(d)).

In response, the defendant filed a motion to dismiss plaintiff's claims for interest suspension and interest netting. The defendant maintains that this court does not have jurisdiction over plaintiff's interest suspension claim because the claim is barred by the doctrine of substantial variance, which precludes a plaintiff from raising claims before a court that were not first presented to the relevant agency for administrative consideration. *See W. Co. of N.*

Am. v. United States, 323 F.3d 1024, 1034 (Fed. Cir. 2003). The defendant also contends that plaintiff's amended refund claim, which raises the issue of interest suspension and was filed after the expiration of the statute of limitations for filing new claims, cannot serve as the basis for this suit. Finally, the defendant argues that the principle of interest netting is not applicable to this case.

FINDINGS OF FACT

During the periods at issue in this case, Computervision was a Delaware corporation with its principal place of business in Massachusetts. Computervision designed, manufactured, and sold computer-aided manufacturing products.

On or about September 14, 1983, Computervision filed a federal income tax return for the 1982 tax year indicating tax payments of $9,817,074.00 (including estimated payments and a credit of an overpayment for Computervision's 1981 tax year), a tax liability of $5,066,843.00, and a resulting overpayment of $4,750,231.00. Computervision elected to credit the overpayment to its tax liability for the 1983 tax year. The transcript for the plaintiff's 1982 tax year indicates that the amount actually credited to Computervision's tax liability for the 1983 year was $4,606,074.44.00.[1]

On September 17, 1984, Computervision filed a federal income tax return for the 1983 tax year reporting

[1] According to the plaintiff, $144,156.59 of the overpayment was credited instead to a 1983 employment tax liability incurred by Computervision.

tax payments of $7,606,074.00[2] (including estimated payments and the credit of the overpayment for the 1982 year), a tax liability of $276,798.00, and a resulting overpayment of $7,329,276.00. Again, Computervision chose to credit the overpayment to its tax liability for the following year, the 1984 tax year.

On July 2, 1985, Computervision filed a federal income tax return for the 1984 tax year indicating tax payments of $20,314,261.00 (including estimated payments and the credit of the overpayment for the 1983 year), a tax liability of $13,148,230.00, and a resulting overpayment of $7,166,031.00. After electing to credit the 1983 overpayment (including 100 percent of the amount credited forward from 1982) to 1984, Computervision requested a refund of the 1984 overpayment (again, including the entire amount of the credit from 1982). On August 2, 1985, the IRS paid Computervision a refund of $7,166,031.02, without interest.

After an audit of Computervision's 1982 tax return, the IRS issued an examination report, dated January 7, 1986, proposing a deficiency of $6,224,982.00 for the 1982 tax year.[3] During the course of the audit, the IRS determined that Computervision International, Inc. (CVI), a subsidiary of Computervision, had failed to qualify as a

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[2] The reported payments of $7,606,074.00 consisted of payments totaling $11,606,074.00, net of a refund of $4,000,000.00 previously requested on Form 4466.

[3] Computervision completed four Forms 872, Consent to Extend the Time to Assess Tax, which extended the period of limitations for assessments for the 1982 year to December 31, 1986; June 30, 1987; December 31, 1987; and June 30, 1988.

domestic international sales corporation[4] (DISC) for its taxable year ending January 31, 1983.[5] A portion of the proposed deficiency for the 1982 tax year was attributable to the proposed disqualification of CVI as a DISC.

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[4] A domestic international sales corporation (DISC) is defined as follows:

> § 992. Requirements of a domestic international sales corporation
>
> (a) Definition of "DISC" and "former DISC"
>
> (1) DISC
>
> For purposes of this title, the term "DISC" means, with respect to any taxable year, a corporation which is incorporated under the laws of any State and satisfies the following conditions for the taxable year:
>
> (A) 95 percent or more of the gross receipts (as defined in section 993(f)) of such corporation consist of qualified export receipts (as defined in section 993(a)),
>
> (B) the adjusted basis of the qualified export assets (as defined in section 993(b)) of the corporation at the close of the taxable year equals or exceeds 95 percent of the sum of the adjusted basis of all assets of the corporation at the close of the taxable year,
>
> (C) such corporation does not have more than one class of stock and the par or stated value of its outstanding stock is at least $2,500 on each day of the taxable year, and
>
> (D) the corporation has made an election pursuant to subsection (b) to be treated as a DISC and such election is in effect for the taxable year.

26 U.S.C. § 992(a)(1) (1982) (hereinafter § 992(a)(1)).

[5] According to plaintiff, during the relevant time period, CVI, a wholly-owned subsidiary of Computervision, served as a commission agent for Computervision's sales that generated qualified export receipts within the meaning of § 993(a), and was paid a commission pursuant to §§ 994(a)(2) and 994(b). On January 31, 1983, CVI paid $33,083,438.13 to Computervision for the purpose of reimbursing the company for certain expenses it incurred on CVI's behalf, purchasing

(Continued on following page)

On January 30, 1986, Computervision filed Form 1139, Corporation Application for Tentative Refund, in which it carried back a net operating loss (NOL) from Computervision's 1985 tax year to the 1982 tax year. On April 11, 1986, Computervision submitted a protest to the District Director of Internal Revenue in Boston, Massachusetts regarding the IRS' position with respect to its 1982 taxable year, as outlined in the examination report. At a proceeding before the Boston Appeals Office of the IRS, Computervision and the IRS settled all the issues included in the 1982 examination report (the settled issues), except those relating to the DISC disqualification issue. As a result, the IRS revised the proposed income tax deficiency for Computervision's 1982 year. Without including the 1985 NOL carryback, that amount came to $7,886,409.00. The 1985 NOL carryback tentatively eliminated $7,848,633.00 of the proposed income tax deficiency of $7,886,409.00 for the 1982 tax year, but it did

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all of the qualified export receivables then held by Computervision, and distributing the balance as a dividend to Computervision. On or about February 23, 1983, declaration of the dividend was confirmed by a consent vote executed by CVI's directors, and dated as of January 31, 1983, the date the dividend was paid.

The January 31, 1983 transactions formed the basis of the IRS' proposed disqualification of CVI as a DISC. According to the plaintiff, the IRS erroneously treated the January 31, 1983 transactions as ineffective until the precise amounts of the dividend, the reimbursement, and the receivables purchase were ascertained and recorded in the books of account of CVI and Computervision. As a result, CVI's payment on January 31, 1983 created a loan or receivable that was not a "qualified export asset" pursuant to § 993(b). According to the plaintiff, it was on these grounds that the IRS erroneously determined that CVI failed to comply with § 992(a)(1)(B) for the 1982 taxable year. The plaintiff argued that, at the end of tax year 1982, CVI did not have non-qualified export assets in excess of the amounts permitted by IRC § 992(a)(1)(B). Therefore, the plaintiff contended that the IRS' disqualification of CVI as a DISC was erroneous and improper.

not eliminate Computervision's liability for: 1) a deficiency of $37,776.00 attributable to investment tax credit recapture; and 2) "restricted" interest[6] that had accrued on the proposed, potential deficiency of $7,848,633.00 for the 1982 tax year from the due date of the 1982 return (March 15, 1983) to the due date of the 1985 return (March 15, 1986). In addition, the IRS assessed additional interest on both the restricted interest and the tax of $37,776.00 after March 15, 1986 through May 5, 1988.

On April 5, 1988, the IRS received a Form 870 signed by Computervision waiving the restrictions on assessment of the $37,776.00 tax deficiency attributable to investment tax credit recapture. On June 3, 1988, the IRS assessed tax in the amount of $37,776.00 for the 1982 tax year, along with deficiency interest in the amount of $4,095,974.42. The deficiency interest was computed based on the full amount of the proposed deficiency in tax of $7,886,409.00, from the date of the 1982 return to the date of the elimination of $7,848,633.00 of that proposed deficiency by the 1985 NOL carryback. The tax of $37,776.00 attributable to the recapture of investment tax credits was paid in full.

On June 8, 1988, Computervision received a bill, dated June 3, 1988, from the IRS for interest in the amount of $4,095,974.42 for the 1982 tax year. On April 28, 1989, Computervision paid $4,045,011.64 of the assessment. The remainder of the assessment was satisfied by prior payments made by Computervision on August 27, 1987, March 7, 1989 and March 10, 1989.

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[6] As plaintiff explained, § 6601(d) prevented the application of the 1985 carrybacks to reduce any underpayment for 1982 until the original due date of the 1985 return. The interest resulting from such a restriction on the use of a carryback or other adjustment is referred to as "restricted" interest.

Therefore, as of April 28, 1989, the entire interest assessment of $4,095,974.42 was paid.

The IRS also conducted an audit of Computervision's taxable years ending December 31, 1983, 1984, 1987 and February 5, 1988 (respectively, the "1983, 1984, 1987 and 1988 years"). Upon completion of the audit, on October 28, 1988, the IRS issued an examination report proposing deficiencies for those years, as well as for CVI's taxable year ending January 31, 1984. The proposed deficiency for CVI, and a portion of the proposed deficiencies for Computervision's 1983 and 1984 years (computed without regard to net operating loss carrybacks), were also attributable to the proposed disqualification of CVI as a DISC for its taxable years ending January 31, 1983 and 1984.

On August 4, 1989, Computervision filed a timely claim for refund, requesting a portion of the deficiency interest it had paid for its 1982 taxable year that was attributable to the DISC disqualification issue, $2,808,888.00 (the original refund claim).[7] As of April 4, 1990, the IRS had not acted on the original refund claim. On that date, Computervision filed its initial complaint in this case, requesting a refund of $2,808,888.00 in interest paid to the IRS.

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[7] According to the defendant, the original claim for refund was based on a tax liability with respect to the settled issues of $2,215,952.00. The interest that accrued on this amount from March 15, 1983 to April 5, 1988 was $1,254,186.00. The original refund claim indicates that the amount of interest paid by plaintiff was $4,063,074.00. Subtracting $1,254,186.00, the interest attributable to the settled issues, from the amount paid, $4,063,074.00, yields $2,808,888.00, the interest plaintiff claimed is attributed to the DISC issue in its original claim for refund.

On June 23, 1993, the Joint Committee on Taxation approved the tentative NOL carryback from 1985 to 1982, affirming that Computervision had no additional tax liability for the 1982 tax year. In 1993 and 1994, the parties engaged in discovery.

On August 31, 1993, the IRS sent a notice of deficiency to plaintiff for tax years 1983, 1984, 1987 and 1988, as well as a notice of deficiency to CVI for the tax year ending January 31, 1984. On November 4, 1993, plaintiff filed a petition in the United States Tax Court, disputing the deficiencies determined for 1983, 1984, 1987, and 1988. CVI also filed a petition in the Tax Court, contesting the deficiency determination for the tax year ending January 31, 1984. On March 16, 1995, the present case was stayed pending the decision in the Tax Court.

On March 18, 1996, the Tax Court issued an opinion ruling in Computervision's and CVI's favor on the DISC issue; the court held that CVI was, in fact, qualified as a DISC. *Computervision Int'l Corp. v. Comm'r, Computervision Corp. and Subsidiaries v. Comm'r,* 71 T.C.M. (CCH) 2450 (1996). On February 23, 1998, the Tax Court entered decisions as to Computervision's tax liability for the 1983, 1984, 1987 and 1988 tax years, and as to CVI's tax liability for its taxable year ending January 31, 1984. The IRS chose not to appeal the Tax Court decision with respect to CVI, and therefore, that decision became final on May 25, 1998. The IRS appealed the Tax Court decision with respect to Computervision on grounds unrelated to the DISC issue and Computervision conceded the issues involved in the appeal. On January 7, 1999, the United States Court of Appeals for the First Circuit vacated that decision and remanded the case to the Tax Court for a recalculation of Computervision's tax liability. *Computervision Corp. v.*

Comm'r, 164 F.3d 73 (1st Cir. 1999). The matter is still before the Tax Court, pending the entry of a decision pursuant to Rule 155 of the United States Tax Court's Rules of Practice and Procedure.

Based on the decisions of the Tax Court and the United States Court of Appeals for the First Circuit, the parties have reached a consensus as to plaintiff's tax liability for 1982 and for the 1983, 1984, 1987 and 1988 years at issue before the Tax Court. The issues remaining in dispute are: the amount of interest properly refundable to plaintiff with respect to the 1982 tax year, the subject of the proceeding before this court, and the amount of interest properly due from plaintiff to defendant for the 1983, 1984, 1987, and 1988 years at issue before the Tax Court.

Between January 7, 1999, and October 25, 2000, Computervision and the Department of Justice, and Computervision and the IRS, exchanged correspondence relating to the computation of the interest due and refundable. In a letter, dated July 26, 1999, to defendant's counsel, plaintiff's counsel stated that, as a result of an adjustment that had been made by IRS Appeals, the correct taxable income prior to the carryback on which restricted income had been calculated was reduced. In response, in an August 26, 1999 letter, defendant's counsel requested plaintiff's counsel to "prepare a new computation showing the amount of restricted interest to which you believe plaintiff is entitled in view of the changes indicated above."

On September 7, 1999, plaintiff's counsel sent a letter to defendant's counsel, which included a computation purporting to show "the amount of restricted interest owed to the plaintiff." This letter and the attached computation

is labeled Joint Exhibit 10. The computation states that the "Total due from CV" is $1,098,213.00, and that the amount "Paid" on "04/28/89" was $4,063,074.00, resulting in an overpayment of $2,964,861.00, the total amount of interest Computervision apparently believed it was entitled to in September of 1999.

On December 28, 1999, as part of a possible settlement of this case, the Tax Division recommended and referred a proposed overpayment of assessed interest of $2,997,761.42[8] as of April 28, 1989, plus statutory interest, to the Joint Committee on Taxation, and advised plaintiff's counsel of the referral on the same date. On January 13, 2000, the Office of Review of the Tax Division advised plaintiff's counsel of a possible offsetting adjustment raised by the Joint Committee on Taxation (i.e., whether Computervision had paid the interest that accrued on the interest assessment of $4,095,974.42, and on the tax assessment of $37,776.00, between the assessment date (June 3, 1988) and the payment dates (March 7, 1989, March 10, 1989 and April 28, 1989)). On April 24, 2000, the Office of Review sent plaintiff's counsel a revised computation of the overpayment of assessed interest for 1982. Due to the accrual of additional interest on the assessed interest deficiency during the period for which

[8] The discrepancy between the Tax Division's proposed overpayment of assessed interest, $2,997,761.42, and the amount Computervision believed it was entitled to, as of September, 1999, $2,964,861.00, can be attributed to a determination by the Office of Review. While evaluating the proposed settlement, the Office of Review determined that plaintiff had understated the total amount of deficiency interest which it had paid. The total amount of deficiency interest that Computervision paid to the IRS, including the payments made prior to April 28, 1999 was $4,095,974.42, the amount assessed (not $4,063,074.00, the amount in plaintiff's 1999 computation).

the deficiency was unpaid, the overpayment, in fact, was reduced from $2,997,761.42 to $2,876,828.29.

On May 2, 2000, plaintiff, in a letter to defense counsel and Mr. Markham of the Office of Review of the Tax Division of the Department of Justice, raised, for the first time, the issue of interest netting pursuant to § 6621(d) with respect to its 1982 deficiency and certain overpayments for tax years 1983 and 1984. Specifically, in the letter, plaintiff stated that it was "writing pursuant to Revenue Procedure 99-43 to request the application of a net interest rate of zero to certain portions of the interest computation in the captioned case." On that same date, plaintiff sent a similar letter to Charles W. Maurer, the IRS District Counsel in the New England District, who was handling the related cases in the Tax Court.

On August 17, 2000, Mr. Maurer sent a letter to plaintiff's counsel, which referred to plaintiff's May 2, 2000 letter "regarding interest netting." This letter was accompanied by an IRS Memorandum, dated August 1, 2000, which contains interest computations for Computervision prepared by the Appeals Audit Staff. The letter and attached memorandum are labeled Joint Exhibit 19. With regard to tax year 1982, the memorandum states: "Revenue ruling 99-40 (Sequa)[9] is applied regarding the credit elect to 1983. No claim is necessary." By letter, dated September 12, 2000, Mr. Maurer forwarded the August 1, 2000 computations to the Tax Division.

In a letter dated September 21, 2000, plaintiff's counsel responded to Mr. Maurer's letter, raising the issue

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[9] *Sequa Corp. v. United States*, 1996 U.S. Dist. LEXIS 5288, 1996 WL 194323 (S.D.N.Y. Apr. 22, 1996).

of interest suspension for the first time based, in part, on the August 1, 2000 computations by the Appeals Audit Staff. On October 25, 2000, the Chief of the Office of Review wrote to plaintiff's counsel, disputing the application of interest suspension in this case on the ground that it had not been specifically requested in the original refund claim:

> One feature of the IRS computation for the suit year 1982 with which we are not in agreement is its suggestion that an additional refund or overpayment can be allowed in the instant litigation over and above that negotiated on the basis of the issues in suit-based upon Revenue Ruling 99-40 *absent the filing of a timely claim for refund raising the issue.*

(emphasis in original). Defendant's counsel repeated this objection in a letter, dated March 14, 2002.

On April 4, 2002, Computervision filed an amended claim for refund specifically requesting the application of interest suspension and interest netting principles in the computation of its refund. On July 9, 2003, an amended complaint was filed in this case, which also requested the application of interest suspension and interest netting in the computation of plaintiff's refund. The amended complaint indicates that plaintiff is now seeking a refund of $3,818,707.55, an amount larger than previously requested.

DISCUSSION

The defendant has filed a motion requesting dismissal of Computervision's complaint, in part, for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules

of the United States Court of Federal Claims (RCFC), and for failure to state a claim. Subject matter jurisdiction may be challenged at any time by the parties, by the court *sua sponte,* and even on appeal. *Fanning, Phillips, Molnar v. West,* 160 F.3d 717, 720 (Fed. Cir. 1998) (quoting *Booth v. United States,* 990 F.2d 617, 620 (Fed. Cir.), *reh'g denied* (1993)); *United States v. Newport News Shipbuilding and Dry Dock Co.,* 933 F.2d 996, 998 n.1 (Fed. Cir. 1991). A plaintiff must establish jurisdiction by a preponderance of the evidence. *Reynolds v. Army and Air Force Exch. Serv.,* 846 F.2d 746, 748 (Fed. Cir. 1988); *Thomas v. United States,* 56 Fed. Cl. 112, 115 (2003); *Martinez v. United States,* 48 Fed. Cl. 851, 857 (2001), *aff'd in part,* 281 F.3d 1376 (Fed. Cir.), *reh'g denied* (2002); *Bowen v. United States,* 49 Fed. Cl. at 675; *Vanalco, Inc. v. United States,* 48 Fed. Cl. 68, 73 (2000); *Alaska v. United States,* 32 Fed. Cl. 689, 695 (1995), *appeal dismissed,* 86 F.3d 1178 (Fed. Cir. 1996) (table). When construing the pleadings pursuant to a motion to dismiss, the court should grant the motion only if "it appears beyond doubt that [the plaintiff] can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to relief." *Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 654 (1999) (quoting *Conley v. Gibson,* 355 U.S. 41, 46 (1957)); *Brubaker Amusement Co. v. United States,* 304 F.3d 1349, 1355 (Fed. Cir. 2002), *cert. denied sub nom. Penn Triple S v. United States,* 538 U.S. 921 (2003); *Leider v. United States,* 301 F.3d 1290, 1295 (Fed. Cir.), *reh'g denied, reh'g en banc declined* (2002), *cert. denied,* 538 U.S. 978 (2003); *Conti v. United States,* 291 F.3d 1334, 1338 (Fed. Cir. 2002), *cert. denied,* 537 U.S. 1112 (2003); *Consol. Edison Co. v. O'Leary,* 117 F.3d 538, 542 (Fed. Cir. 1997), *cert. denied sub nom. Consol. Edison Co. v. Pena,* 522 U.S. 1108 (1998); *see also New Valley Corp. v. United States,* 119 F.3d 1576,

1579 (Fed. Cir.), *reh'g denied, reh'g en banc declined* (1997); *Highland Falls-Fort Montgomery Cent. School Dist. v. United States,* 48 F.3d 1166, 1169 (Fed. Cir.), *cert. denied,* 516 U.S. 820 (1995); *Hamlet v. United States,* 873 F.2d 1414, 1416 (Fed. Cir. 1989), *cert. denied,* 517 U.S. 1155 (1996); *W.R. Cooper Gen. Contractor, Inc. v. United States,* 843 F.2d 1362, 1364 (Fed. Cir. 1988) ("When the facts alleged in the complaint reveal 'any possible basis on which the non-movant might prevail, the motion must be denied.'"); *RCS Enters., Inc. v. United States,* 46 Fed. Cl. 509, 513 (2000).

Pursuant to RCFC 8(a)(1) and Rule 8(a)(1) of the Federal Rules of Civil Procedure, a plaintiff need only state in the complaint "a short and plain statement of the grounds upon which the court's jurisdiction depends." RCFC 8(a)(1). However, "[d]etermination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States,* 124 F.3d 1462, 1465 (Fed. Cir.), *reh'g denied* (1997) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1 (1983)). Nevertheless, "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe v. LaHue,* 663 F.2d 713, 723 (7th Cir. 1981), *aff'd,* 460 U.S. 325 (1983); *Bradley v. Chiron Corp.,* 136 F.3d 1317, 1322 (Fed. Cir. 1998) ("Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim.").

When deciding a motion to dismiss based on a lack of subject matter jurisdiction, this court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the non-movant's

favor. *See Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Conley v. Gibson,* 355 U.S. at 45-46; *Boise Cascade Corp. v. United States,* 296 F.3d 1339, 1343 (Fed. Cir. 2002), *cert. denied,* 538 U.S. 906 (2003); *Pixton v. B & B Plastics, Inc.,* 291 F.3d 1324, 1326 (Fed. Cir. 2002); *Commonwealth Edison Co. v. United States,* 271 F.3d 1327, 1338 (Fed. Cir. 2001) (quoting *New Valley Corp. v. United States,* 119 F.3d at 1580), *cert. denied,* 535 U.S. 1096 (2002); *Boyle v. United States,* 200 F.3d 1369, 1372 (Fed. Cir. 2000); *Perez v. United States,* 156 F.3d 1366, 1370 (Fed. Cir. 1998); *Highland Falls-Fort Montgomery Cent. School Dist. v. United States,* 48 F.3d at 1167 (citing *Gould, Inc. v. United States,* 935 F.2d 1271, 1274 (Fed. Cir. 1991)); *Henke v. United States,* 60 F.3d 795, 797 (Fed. Cir. 1995); *Hamlet v. United States,* 873 F.2d at 1416; *Ho v. United States,* 49 Fed. Cl. 96, 100 (2001), *aff'd,* 30 Fed. Appx. 964 (Fed. Cir. 2002); *Alaska v. United States,* 32 Fed. Cl. at 695. If a defendant or the court challenges jurisdiction or plaintiff's claim for relief, however, the plaintiff cannot rely merely on allegations in the complaint, but must instead bring forth relevant, competent proof to establish jurisdiction. *McNutt v. Gen. Motors Acceptance Corp. of Ind.,* 298 U.S. at 189; *see also Land v. Dollar,* 330 U.S. 731, 735 n.4 (1947); *Reynolds v. Army and Air Force Exch. Serv.,* 846 F.2d at 747; *Catellus Dev. Corp. v. United States,* 31 Fed. Cl. at 404-05 (1994). When considering a motion to dismiss for lack of subject matter jurisdiction, the court may examine relevant evidence in order to resolve any factual disputes. *See Moyer v. United States,* 190 F.3d 1314, 1318 (Fed. Cir. 1999); *Reynolds v. Army and Air Force Exch. Serv.,* 846 F.2d at 747; *see also Cedars-Sinai Med. Ctr. v. Watkins,* 11 F.3d 1573, 1584 (Fed. Cir. 1993) ("In establishing predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but may review evidence

extrinsic to the pleadings, including affidavits and deposition testimony."), *cert. denied,* 512 U.S. 1235 (1994); *Vanalco v. United States,* 48 Fed. Cl. at 73 ("If the truth of the alleged jurisdictional facts is challenged in a motion to dismiss, the court may consider relevant evidence to resolve the factual dispute.")

In order for this court to have jurisdiction over a plaintiff's complaint, the Tucker Act requires that the plaintiff identify an independent substantive right enforceable against the United States for money damages. 28 U.S.C. § 1491. The Tucker Act states:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). As interpreted by the United States Supreme Court, this Act waives sovereign immunity to allow jurisdiction over claims (1) founded on an express or implied contract with the United States, (2) seeking a refund from a prior payment made to the government or (3) based on federal constitutional, statutory, or regulatory law mandating compensation by the federal government for damages sustained. *See United States v. Testan,* 424 U.S. 392, 400, *reh'g denied,* 425 U.S. 957 (1976) (citing *Eastport Steamship Corp. v. United States,* 178 Ct. Cl. 599, 605-06, 372 F.2d 1002, 1009 (1967)); *see also Palmer v. United States,* 168 F.3d 1310, 1314 (Fed. Cir. 1999); *Stinson, Lyons & Bustamante, P.A. v. United States,* 33 Fed. Cl. 474, 478 (1995), *aff'd,* 79 F.3d 136 (Fed. Cir.

1996). A waiver of traditional sovereign immunity cannot be implied but must be "unequivocally expressed." *INS v. St. Cyr,* 533 U.S. 289, 299 n.10 (2001); *United States v. Nordic Village, Inc.,* 503 U.S. 30, 33 (1992); *Ins. Co. of the West v. United States,* 243 F.3d 1367, 1372 (Fed. Cir.), *reh'g denied, reh'g en banc declined* (2001); *Saraco v. United States,* 61 F.3d 863, 864 (Fed. Cir. 1995) (quoting *United States v. King,* 395 U.S. 1, 4 (1969)), *cert. denied,* 517 U.S. 1166 (1996).

The Tucker Act, however, merely confers jurisdiction on the United States Court of Federal Claims; "'it does not create any substantive right enforceable against the United States for money damages.'" *United States v. Mitchell,* 445 U.S. 535, 538 (quoting *United States v. Testan,* 424 U.S. at 398-99), *reh'g denied,* 446 U.S. 992 (1980); *White Mountain Apache Tribe v. United States,* 249 F.3d 1364, 1372 (Fed. Cir.), *reh'g denied, reh'g en banc declined* (2001), *aff'd,* 537 U.S. 465 (2003); *Cyprus Amax Coal Co. v. United States,* 205 F.3d 1369, 1373 (Fed. Cir. 2000), *cert. denied,* 532 U.S. 1065 (2001); *New York Life Ins. Co. v. United States,* 118 F.3d 1553, 1555-56 (Fed. Cir. 1997), *cert. denied,* 523 U.S. 1094 (1998); *United States v. Connolly,* 716 F.2d 882, 885 (Fed. Cir. 1983) (en banc), *cert. denied,* 465 U.S. 1065 (1984). Individual claimants, therefore, must look beyond the jurisdictional statute for a waiver of sovereign immunity. *United States v. Mitchell,* 445 U.S. at 538. In order for a claim to be successful, the plaintiff "must also demonstrate that the source of law relied upon 'can fairly be interpreted as mandating compensation by the federal government for the damages sustained.'" *White Mountain Apache Tribe v. United States,* 249 F.3d at 1372 (quoting *United States v. Mitchell,* 463 U.S. 206, 216-17 (1983)); *United States v. Testan,* 424

U.S. at 400; *Tippett v. United States,* 185 F.3d 1250, 1254 (Fed. Cir. 1999) ("[T]he plaintiff must assert a claim under a separate money-mandating constitutional provision, statute, or regulation, the violation of which supports a claim for damages against the United States.") (quoting *James v. Caldera,* 159 F.3d 573, 580 (Fed. Cir. 1998), *reh'g denied* (1999)); *Doe v. United States,* 100 F.3d 1576, 1579 (Fed. Cir. 1996), *reh'g denied, reh'g en banc declined* (1997); *Eastport Steamship Corp. v. United States,* 178 Ct. Cl. at 607, 372 F.2d at 1009.

Turning to RCFC 12(b)(6), the court should dismiss a case for failure to state a claim only if "it appears beyond doubt that [plaintiff] can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 654 (1999) (quoting *Conley v. Gibson,* 355 U.S. 41, 46 (1957)); *Consolidated Edison Co. v. O'Leary,* 117 F.3d 538, 542 (Fed. Cir. 1997), *cert. denied,* 522 U.S. 1108 (1998); *see also New Valley Corp. v. United States,* 119 F.3d 1576, 1579 (Fed. Cir.), *reh'g denied, en banc suggestion declined* (1997); *Highland Falls-Fort Montgomery Cent. School Dist. v. United States,* 48 F.3d 1166, 1169 (Fed. Cir.), *cert. denied,* 516 U.S. 820 (1995); *Hamlet v. United States,* 873 F.2d 1414, 1416 (Fed. Cir. 1989); *W.R. Cooper Gen. Contractor, Inc. v. United States,* 843 F.2d 1362, 1364 (Fed. Cir. 1988) ("When the facts alleged in the complaint reveal 'any possible basis on which the non-movant might prevail, the motion [to dismiss] must be denied.'"); *RCS Enterps., Inc. v. United States,* 46 Fed. Cl. 509, 513 (2000).

Pursuant to RCFC 8(a)(1), as well as Federal Rules of Civil Procedure 8(a)(1), a plaintiff need only state in the complaint "a short and plain statement of the grounds upon which the court's jurisdiction depends." RCFC

8(a)(1). However, "[d]etermination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States,* 124 F.3d 1462, 1465 (Fed. Cir.), *reh'g denied* (1997) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1 (1983)). "[C]onclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe v. LaHue,* 663 F.2d 713, 723 (7th Cir. 1981), *aff'd,* 460 U.S. 325 (1983); *see also Bradley v. Chiron Corp.,* 136 F.3d 1317, 1322 (Fed. Cir. 1998) ("Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim.").

When deciding on a motion to dismiss based on failure to state a claim, this court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the non-movant's favor. *See Conley v. Gibson,* 355 U.S. at 45-46; *Boyle v. United States,* 200 F.3d 1369, 1372 (Fed. Cir. 2000); *Perez v. United States,* 156 F.3d 1366, 1370 (Fed. Cir. 1998); *Highland Falls-Fort Montgomery Cent. School Dist. v. United States,* 48 F.3d at 1167 (citing *Gould, Inc. v. United States,* 935 F.2d 1271, 1274 (Fed. Cir. 1991)); *Henke v. United States,* 60 F.3d 795, 797 (Fed. Cir. 1995); *Hamlet v. United States,* 873 F.2d at 1416; *Ho v. U.S.,* 49 Fed. Cl. 96, 100 (2001); *Alaska v. United States,* 32 Fed. Cl. 689, 695 (1995). If a defendant or the court challenges jurisdiction or plaintiff's claim for relief, however, the plaintiff cannot rely merely on allegations in the complaint, but must instead bring forth relevant, competent proof to establish jurisdiction. *McNutt v. Gen. Motors Acceptance Corp. of Ind.,* 298 U.S. at 189; *see also Reynolds v. Army & Air*

Force Exch. Serv., 846 F.2d at 747; *Catellus Dev. Corp. v. United States,* 31 Fed. Cl. at 404-05. "A motion to dismiss under Rule [12(b)(6)] for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not under the law entitle him to a remedy." *Perez v. United States,* 156 F.3d at 1370.

Deficiency interest, which is defined as interest on an amount of unpaid tax, is governed by § 6601, which states: "If any amount of tax imposed by this title . . . is not paid on or before the last date prescribed for payment, interest on such amount . . . shall be paid for the period from such last date to the date paid." While the parties agree that Computervision is entitled to a refund of deficiency interest related to tax year 1982, the parties disagree as to the amount of interest properly refundable to plaintiff.[10] In this suit, Computervision claims that it is entitled to a refund of deficiency interest in the amount of $3,818,707.55 for tax year 1982. The defendant, however, believes plaintiff is entitled to a refund of $2,997,761.42. According to the defendant, this figure represents the amount of deficiency interest associated with the DISC disqualification issue, which served as the basis for plaintiff's original refund claim. The difference between the two figures cited by the parties is $820,946.13, the amount of deficiency interest in dispute. In this case, plaintiff claims it is entitled to this additional amount of interest based on the principles of interest suspension and/or interest netting. Specifically, plaintiff contends that interest on its 1982 tax deficiency should be suspended from March 15, 1983

[10] The parties also disagree as to the amount of interest properly due from plaintiff to defendant for the 1983, 1984, 1987 and 1988 years at issue before the Tax Court.

through August 2, 1985. Additionally, to the extent that interest is not suspended, plaintiff asserts that a net interest rate of zero should be applied for the periods during which its 1982 tax deficiency was offset by overpayments for 1983 and 1984.

I. Interest Suspension Claim

Prior to maintaining a suit to recover improperly assessed taxes or interest, a taxpayer must satisfy the statutory prerequisite of filing an administrative claim with the IRS. Section 7422(a) states:

> (a) No suit prior to filing claim for refund.
>
> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. § 7422(a) (1988). In other words, the administrative claim must comport with both "the provisions of law . . . and the regulations of the [IRS]." *Id.* For a claim to be properly before the court, it must be filed in compliance with the statute of limitations codified at 26 U.S.C. § 6511(a). *United States v. Dalm,* 494 U.S. 596, 602 (1990), *reh'g denied,* 495 U.S. 941 (1990). In relevant part, § 6511(a) requires that any

> [c]laim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later.

26 U.S.C. § 6511(a) (1988).

Failure to comply with § 6511(a) results in the absence of jurisdiction for the court to resolve the claim on the merits, and the suit must be dismissed pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims for want of subject matter jurisdiction. *United States v. Dalm,* 494 U.S. at 602.

Treasury Regulation § 301.6402-2 similarly restricts the allowance of refunds to claims that have been filed prior to the expiration of the statute of limitations. 26 C.F.R. § 301.6402-2 (1989). In addition, § 301.6402-2 requires that claims for refund "must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof."[11] Treas. Reg. § 301.6402-2(b)(1).

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[11] Treasury Regulation § 301.6402-2(b)(1) states in full:

> (b) Grounds set forth in claim. (1) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not

(Continued on following page)

As the United States Court of Claims stated in *Alexander Proudfoot Company,* the requirement for filing an adequate refund claim:

> is designed both to prevent surprise and to give adequate notice to the Service of the nature of the claim and the specific facts upon which it is predicated, thereby permitting an administrative investigation and determination. In addition, the Commissioner is provided with an opportunity to correct any errors, and if disagreement remains, to limit the scope of any ensuing litigation to those issues which have been examined and which he is willing to defend.

Alexander Proudfoot Co. v. United States, 197 Ct. Cl. 219, 227, 454 F.2d 1379, 1383 (1972) (citation omitted) (quoting *Union Pac. R.R. v. United States,* 182 Ct. Cl. 103, 109, 389 F.2d 437, 442 (1968)).

Furthermore, the requirement of a timely claim for refund pursuant to §§ 6511 and 7422 applies to a claim for refund of overpaid assessed interest, as well as a refund of overpaid tax. As the Court of Claims has stated:

> All of these [public policy] goals are advanced by adhering to the claim requirement (as well as truncated limitations) even where deficiency interest alone is at stake. There is no greater burden on the taxpayer than where the principal amount of the tax and the deficiency interest are both challenged. The Service, on the other hand, has just as much need to know that its determination is being attacked.

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comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

Alexander Proudfoot Co. v. United States, 197 Ct. Cl. at 227-28, 454 F.2d at 1383; *John B. Lambert & Assocs. v. United States,* 212 Ct. Cl. 71, 86 (1976) ("Even where deficiency interest alone is at stake, timely notice at the administrative level is a prerequisite to later suit."); *Crompton Corp. v. United States,* No. 01-182T, 2003 U.S. Claims LEXIS 211, at *10-11 (Fed. Cl. July 8, 2003) ("Claims for refunds of deficiency interest are subject to the same Section 7422 and 6511 limitations as claims for the underlying tax."); *Mobil Corp. v. United States,* 52 Fed. Cl. 327, 331 (Fed. Cl. 2002); *Four Star Oil & Gas Co. v. United States,* 49 Fed. Cl. 755, 759, *order modified on reconsideration,* 51 Fed. Cl. 110 (2001).

In *Lockheed Martin Corporation,* the United States Court of Appeals for the Federal Circuit noted that § 7422(a) and § 301.6402-2(b)(1) have long been recognized to prevent a taxpayer from substantially varying the legal or the factual basis of an administrative claim when before a court. *Lockheed Martin Corp. v. United States,* 210 F.3d 1366, 1371 (Fed. Cir. 2000) ("Courts have long interpreted § 7422(a) and Treasury Reg. § 301.6402-2(b)(1) as stating a 'substantial variance' rule which bars a taxpayer from presenting claims in a tax refund suit that 'substantially vary' the legal theories and factual bases set forth in the tax refund claim presented to the IRS."); *accord W. Co. of N. Am. v. United States,* 323 F.3d at 1034. This principle, referred to as the "substantial variance rule," ensures that the IRS has "notice as to the nature of the claim and the specific facts upon which it is predicated," ensures that the IRS has "an opportunity to correct errors," and "limits any subsequent litigation to those grounds that the IRS had an opportunity to consider and is willing to defend." *Lockheed Martin Corp. v. United States,* 210 F.3d at 1371.

The principle of interest suspension is derived from a decision in this court in *May Department Stores Co. v. United States,* 36 Fed. Cl. 680 (1996). Based on that decision, the IRS articulated its policy of interest suspension in Revenue Ruling 99-40:

> In light of the *May Department Stores* decision, the Service has reconsidered the manner in which interest on a subsequently determined deficiency is computed under § 6601(a) when the taxpayer makes an election to apply an overpayment to the succeeding year's estimated taxes. When a taxpayer elects to apply an overpayment to the succeeding year's estimated taxes, the overpayment is applied to unpaid installments of estimated tax due on or after the date(s) the overpayment arose, in the order in which they are required to be paid to avoid an addition to tax for failure to pay estimated income tax under §§ 6654 or 6655 with respect to such year. The Service will assess interest on a subsequently determined deficiency for the overpayment year from the date(s) that the overpayment is applied to the succeeding year's estimated taxes.[12]

Rev. Rul. 99-40, 1999-2 C.B. 441.

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[12] It should be noted, here, that Revenue Ruling 99-40 articulates the principle of interest suspension as it exists today, and was issued in 1999, a decade after the original refund claim was filed in this case. However, at the time of the original refund claim, in 1989, the IRS did apply some form of interest suspension. *See* Rev. Rul. 88-98, 1988-2 C.B. 356; *Avon Prods., Inc. v. United States,* 588 F.2d 342 (1978). Therefore, theoretically, it was possible for the plaintiff to have made an interest suspension claim in 1989 based on the law in existence at that time.

As noted, pursuant to § 6511(a), a claim for refund must be filed with the IRS "within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever . . . expires the later. . . . " In this case, the 1982 return was filed in September of 1983, and the interest at issue was paid between March 7, 1989, and April 28, 1989. Since the payment date, April 28, 1989, is the later date, under § 6511(a), the statute of limitations for filing a refund claim expired on April 28, 1991, two years after payment.

In August of 1989, Computervision timely filed its original refund claim, requesting a refund of $2,808,888.00 in deficiency interest. The primary legal ground cited by plaintiff for its refund request was that the IRS erroneously determined that its subsidiary, CVI, did not qualify as a DISC.[13] The original refund claim stated: "Computervision disagrees with this conclusion [the IRS' proposed disqualification of CVI] and is hereby making this claim for refund for the portion of the interest paid that is attributable to the disqualification of [CVI] as a DISC for its fiscal year ending January 31, 1983."

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[13] Computervision's original refund claim also listed "Alternative Issues" under its "Grounds For Refund." Those issues, as explained in the original refund claim, were the following:

> the Examination Report erroneously asserted that the commission paid by Computervision to International for Computervision's 1982 taxable year (the "DISC Commission") was greater than that permitted by the statute as the result of the manner in which Computervision (1) allocated the discount arising from the sale of certain accounts receivable to International, and (2) computed International's export promotion expenses.

In addition, a general ground for refund was listed, which will be discussed below.

Similarly, the original complaint filed in this court on April 4, 1990 stated that the "disqualification of International as a DISC was . . . erroneous and improper" and requested a refund of $2,808,888 "attributable to the disqualification of International as a DISC for its taxable year ending January 31, 1983." Neither the original refund claim, nor the original complaint, mentioned the theory of interest suspension.

As noted, under the doctrine of substantial variance, a taxpayer is precluded from substantially varying the legal or factual basis of an administrative claim when before a court. *W. Co. of N. Am. v. United States,* 323 F.3d at 1034. More specifically, the Federal Circuit has stated:

> With regard to the legal component of the "substantial variance" rule, "[a]ny legal theory not expressly or impliedly contained in the application for refund cannot be considered by a court in which a suit for refund is subsequently initiated." The taxpayer similarly may not substantially vary at trial the factual bases raised in the refund claims presented to the IRS.

Lockheed Martin Corp. v. United States, 210 F.3d at 1371 (quoting *Burlington N., Inc. v. United States,* 231 Ct. Cl. 222, 684 F.2d 866, 868 (1982) (citations omitted)); *see also Ottawa Silica Co. v. United States,* 699 F.2d 1124, 1138 (Fed. Cir. 1983) ("[A] ground for a refund that is neither specifically raised by a timely claim for a refund, nor comprised within the general language of the claim, cannot be considered by a court in a subsequent suit for a refund." (citations omitted)); *Union Pac. R.R. Co. v. United States,* 182 Ct. Cl. at 103, 389 F.2d at 442; *First Nat'l Bank of Montgomery v. United States,* 150 Ct. Cl. 798, 803, 280 F.2d 818, 821 (1960).

Neither party disputes the fact that Computervision's original refund claim did not explicitly raise the issue of interest suspension. As the defendant underscores, a request for a refund of additional interest based on the theory of interest suspension "was not raised with the Tax Division of the Department of Justice, and with the IRS attorney assigned to defend the Tax Court cases, until late in the year 2000," well after the statute of limitations expired on April 28, 1991. On April 4, 2002, eleven years after the statute of limitations had expired, the plaintiff filed an amended claim for a refund of deficiency interest in the amount of $3,818,707.55, which included the original claim of $2,808,888.00 in interest, plus additional interest under the theory of interest suspension. In the amended refund claim, the plaintiff, for the first time, explicitly asserted "Interest Suspension" as one of the "Grounds For Refund." The amended complaint in this case, filed on July 9, 2003, requested $3,818,707.55 in interest and also requested the application of the doctrine of interest suspension.

The defendant's primary argument is that, "[s]ince the two-year period for filing a refund claim following the last payment of tax ended on April 28, 1991, the statute of limitations for filing a refund claim for restricted interest in excess of the amount attributable to the DISC issue had expired" by the time the plaintiff raised the theory of interest suspension in 2000 and April, 2002. In other words, since the plaintiff failed to articulate its interest suspension claim in its original refund claim in 1989, the claim is barred by the doctrine of substantial variance. According to the defendant, "[p]laintiff's claim for interest suspension is different from, and independent of, the 1989 claim" and, therefore, the plaintiff is attempting to raise

"an entirely new legal theory, and the facts to support that theory," twelve years after the statute of limitations barred the filing of a claim for refund. The defendant also contends that the amended refund claim, which does mention the interest suspension claim, but was submitted after the expiration of the statute of limitations, cannot form the basis for the present suit. In response, the plaintiff makes a number of arguments, addressed below.

A. The Original Refund Claim Includes the Interest Suspension Claim

The plaintiff argues that its interest suspension claim is "within the scope of the Original [1989] Refund Claim" and, therefore, is not barred by the doctrine of substantial variance. In support of its contention that the interest suspension claim is within the scope of the original refund claim, the plaintiff makes three sub-arguments.

1. The Interest in Dispute is "Attributable" or "Relates" to the DISC Issue

The plaintiff maintains that the interest suspension claim, even though not specifically claimed in the original refund claim, was adequately raised by its specific request for a refund of interest "attributable" or "relating" to the disqualification of CVI as a DISC. In other words, plaintiff argues that the disputed interest is "attributable," or is "related," to the DISC issue. Therefore, the plaintiff contends that the interest suspension claim is implicitly included in the original refund claim and is not barred by the doctrine of substantial variance.

The defendant, however, maintains that "no part of the additional deficiency interest plaintiff is claiming

either relates to, or is attributable to, the DISC issue, but is attributable to and relates to the issues settled with Appeals [the Boston Appeals Office of the IRS]." The premise of defendant's argument is that the total deficiency interest paid by plaintiff in 1982 can be divided into two amounts: "that attributable to the deficiency resolved in Appeals, as to which no refund claim was filed, and that which was attributable to the DISC issue." More specifically, the first amount of deficiency interest is attributable to certain issues, which were settled with Appeals prior to the filing of the original refund claim, and deficiency interest was assessed with respect to those issues ("the settled issues").[14] The second amount of deficiency interest stems from the IRS' assessment of a tax deficiency on plaintiff based on its determination that CVI did not qualify as a DISC ("the DISC issue"). As noted, the plaintiff prevailed on the DISC issue in related litigation in the Tax Court. As a result, the defendant has conceded all the interest with respect to the DISC issue, an amount of $2,997,761.42. In other words, in the defendant's view, no interest suspension claim exists with regard to the DISC issue because plaintiff is entitled to all of the interest associated with the DISC issue, due to the defendant's loss on that issue in the Tax Court. As defendant has noted, if the DISC issue

> is conceded, application of the "correct" method of computing deficiency [i.e., interest suspension] *will not affect by one penny* the deficiency

[14] According to the plaintiff, the reason that interest associated with issues settled prior to the filing of the original refund claim is in dispute in this case is "because, even though Computervision reached a settlement as to the effect of the settled issues on its tax liability, there was no settlement as to the interest due from Computervision."

> interest that the taxpayer will receive as to [the DISC issue], since plaintiff is entitled to the entire [amount of deficiency interest attributable to the DISC issue] in any event. What plaintiff seeks to recover here is the equivalent of the [amount of deficiency interest] attributable to the application of "interest suspension" to [the settled issues]. . . . The loss in the Tax Court (and the consequent concession of the DISC issue involved here) effectively resolved this case-or did so until plaintiff began asserting belatedly its interest netting and interest suspension claims.

(emphasis in original).

To demonstrate that the interest currently in dispute does not relate to the DISC issue, but the settled issues, and is not included in the original refund claim, the defendant has directed the court's attention to Joint Exhibit 10 in both its briefs and in oral argument. As indicated above, Joint Exhibit 10 is a letter, dated September 7, 1999, from plaintiff's counsel to defense counsel, in which plaintiff's counsel states that he is enclosing a computation "showing the amount of restricted interest owed to the plaintiff."

In its supplemental brief, the defendant submitted the declaration of Micheline M. Maritz, a recomputation specialist at the Office of Review of the Tax Division, in which Ms. Maritz explained the computations plaintiff sent to the Department of Justice in Joint Exhibit 10. The computation calculates interest on a tax liability of $2,102,421.00. According to Ms. Maritz, the tax of

$2,102,421.00 is the tax attributable to the settled issues.[15] Plaintiff appears to agree, citing the tax deficiency of $2,102,421.00 as arising from issues it settled with the Boston Appeals Office of the IRS.

In Joint Exhibit 10, the plaintiff also computed the amount of interest it owed, the amount paid, and the amount overpaid. Specifically, the computation indicates that interest on $2,102,421.00, computed from March 15, 1983 to May 5, 1988, is $1,098,213.00. Therefore, $1,098,213.00, which Ms. Maritz maintains is the amount of interest attributable to the settled issues, is listed as the "Total due from CV." The computation indicates, apparently erroneously, that the amount of interest plaintiff paid on April 28, 1989 is $4,063,074.00. It further demonstrates that the difference between the amount of interest shown as paid, $4,063,074.00, and the amount of interest shown as attributable to the settled issues, $1,098,213.00, is $2,964,861.00, which is listed as "Overpayment." According to Ms. Maritz, this figure is the amount attributable to the DISC issue.

However, the actual, total amount of interest assessed and paid as of April 28, 1989 was $4,095,974.42, not $4,063,074.00, as listed in Joint Exhibit 10. As Ms. Maritz points out, the difference between the correct amount paid, $4,095,974.42, and the $1,098,213.00 attributable to the settled issues is $2,997,761.42, which is the amount that should have been listed as "Overpayment" in Joint Exhibit 10 and which defendant asserts is the amount of interest

[15] This amount differs from the $2,215,952.00 listed in the plaintiff's original refund claim because, according to the defendant, the tax attributable to the settled issues was revised by agreement.

attributable to the DISC issue. Defendant concedes that plaintiff is entitled to this amount, $2,997,761.42, based on the decision of the Tax Court, previously discussed. According to the defendant, the $820,946.13 of deficiency interest currently in dispute is part of the $1,098,213.00 in interest associated with the settled issues, not the DISC issue, and, therefore, this amount is not encompassed within the original refund claim.

As defendant underscores, "[p]laintiff's own computations establish that the additional deficiency interest which plaintiff claims is neither related to, attributable to, nor dependent on the resolution of the DISC issue." In other words, as of September, 1999, the plaintiff's own computations, detailed in Joint Exhibit 10, indicate that it owes $1,098,213.00 in interest, which both parties have contended is attributable to the settled issues, not the DISC issue. In addition, the plaintiff's own 1999 computations indicate that the amount of deficiency interest attributable to the DISC issue is $2,964,861.00, which, as Ms. Maritz explained, actually should be $2,997,761.42, not the $3,818,707.55 that plaintiff is requesting in this action. In short, Joint Exhibit 10 is significant because it demonstrates that, as of September, 1999, ten years after the filing of the original refund claim, the plaintiff, itself, did not contemplate a claim for interest suspension stemming from the original refund claim. Indeed, the plaintiff concedes this fact, stating that the "simple explanation for the absence of an interest suspension claim in Exhibit 10 is that Computervision's counsel was not aware of the availability of interest suspension at the time of the September 7, 1999 letter." Therefore, since, as of September, 1999, the plaintiff failed to raise the issue of interest suspension, its argument before this court, that such a

claim was in fact included in the original 1989 refund claim, is not persuasive.

The policy underlying the requirement that claims for refund "set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof," § 301.6402-2(b)(1) is, in part, "'to prevent surprise and to give adequate notice to the [IRS] of the nature of the claim and the specific facts upon which it is predicated.'" *Alexander Proudfoot Co. v. United States,* 197 Ct. Cl. at 227, 454 F.2d at 1383 (quoting *Union Pac. R.R. v. United States,* 182 Ct. Cl. at 109, 389 F.2d at 442 (citation omitted)). If the plaintiff did not contemplate an interest suspension claim until the year 2000, it is not reasonable to expect that the IRS had adequate notice of such a claim from an examination of the plaintiff's original 1989 refund claim, which primarily contested the IRS' determination regarding the DISC issue. As the defendant argues, "it is impossible to reject specifically a claim which the taxpayer has not yet thought about and the IRS doesn't know that the taxpayer is asserting." Plaintiff's failure to state explicitly its claim for interest suspension in the original refund claim, as mandated by § 301.6402-2(b)(1), resulted in the lack of any notice to the IRS as to the nature of the claim being advanced by plaintiff.

Although plaintiff's September, 1999 letter serves as sufficient evidence that the original refund claim did not encompass a claim for interest suspension, plaintiff attempts to provide further argument. Regarding the approximately $820,946.13 of interest in dispute, plaintiff has divided this amount into two parts: interest that plaintiff alleges is "attributable" to the DISC issue, $556,355.00, and interest "related" to the DISC issue,

$264,591.00. Plaintiff argues that the $556,355.00 of deficiency interest in dispute "attributable" to the DISC issue should be suspended pursuant to the original refund claim. Plaintiff's calculation of this amount, however, reveals the flaw in its argument. In the appendix of its supplemental brief, plaintiff compiled a table illustrating the "Periods of Interest Suspension Attributable to DISC Issue." The first three columns of this table purport to illustrate the "interest suspension claimed by Computervision (from March 15, 1983, through August 2, 1985, on the entire 1982 deficiency of approximately $2.1 million)." The table indicates that plaintiff is calculating the "interest suspension attributable to [the] DISC issue" by employing $2,102,421.00 as the amount of the tax deficiency upon which interest is accrued. However, as Ms. Maritz's affidavit explains, and the plaintiff, itself, asserts in its supplemental brief, the deficiency of $2,102,421.00 is attributable to the settled issues, or the non-DISC issues. Therefore, if the tax deficiency is attributable to the settled issues, the interest that accrues on that deficiency also must be attributable to the settled issues, not the DISC issue.

In conclusion, as the United States Court of Claims has stated, "deficiency interest has been so closely braided to principal that it has been deemed an integral part of the tax . . . The hair is to go with the hide." *Alexander Proudfoot Co. v. United States,* 197 Ct. Cl. at 227, 454 F.2d at 1382. In other words, in this case, the original refund claim is requesting all interest associated with the DISC tax deficiency that was erroneously assessed by the IRS and defendant is willing to refund that amount. In this court, however, plaintiff requests that interest assessed on a tax deficiency, which was settled prior to the filing of the

original refund claim in this case, be suspended. Since the "hair is to go with the hide," in the words of the Court of Claims in *Alexander Proudfoot Company,* the deficiency interest attributable to the DISC issue corresponds to the DISC tax deficiency and the interest associated with the settled issues corresponds to the tax liability with regard to those issues. Therefore, the original refund claim, which requests interest on the DISC issue, cannot also implicitly include a claim that interest related to the settled issues be suspended. Plaintiff's attempt in the present suit to link the tax liability associated with the settled issues to that associated with the DISC issue fails because the two issues are separate and distinct.[16]

Plaintiff also argues that most of the interest suspension relief that Computervision is seeking would not have been available but for the favorable resolution of the DISC issue. Plaintiff explains this argument by stating that:

> if Computervision had not prevailed on the DISC issue in the Tax Court, Computervision's entitlement to interest suspension would have ended

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[16] Indeed, while apparently conceding that the interest in dispute is associated with the settled issues, not the DISC issue, the plaintiff attempts to discount this fact: "it is irrelevant that the disputed interest is associated with a tax *deficiency* attributable to settled issues." (emphasis in original). According to the plaintiff, the defendant "fails to recognize that the computation of interest requires not only a principal amount of indebtedness, but also a period of indebtedness and an interest rate. Thus, the accrual of interest on a tax deficiency is attributable not only to the factors that give rise to the deficiency, but, equally, to the factors that determine the period for which interest accrues, under IRC § 6601, and the rate at which it accrues, under I.R.C. § 6621." While this statement may be true, plaintiff has not demonstrated how these "factors" link its interest suspension claim to the DISC issue and why a tax deficiency attributable to settled issues is related to the DISC issue.

> as of March 15, 1984-the due date of its 1983 tax return-because the disqualification of CVI as a DISC would not only have created a $7.8 million deficiency for 1982, but would also have created a $9.5 million deficiency for 1983. As a result, the Unapplied Payments would have ceased to be "unapplied" as of March 15, 1984, the due date of the 1983 return, when they would have been required to be applied to Computervision's 1983 deficiency. Although Computervision would still have been entitled to the first twelve months of interest suspension that it is presently seeking, it would not have been entitled to interest suspension for the last seventeen months, from March 15, 1984, through August 2, 1985. For that reason, the value of interest suspension for the last seventeen months is directly attributable to the DISC issue.

(footnotes omitted).

In response, the defendant once again maintains that the interest suspension claim is wholly independent of the DISC issue and that "the resolution of the Tax Court litigation on the DISC issue one way or the other would not have affected the interest suspension issue in any way." During the oral argument, defendant explained that, even had plaintiff lost the DISC issue, an interest suspension claim would still exist, if plaintiff filed a timely refund claim, but it would have been greater than the claim presented in this suit: "The interest suspension issue has nothing to do with the DISC issue, win or lose on DISC, there would be an interest suspension issue, assuming a timely claim was filed. It's just that if plaintiff lost the DISC issue, it would have a bigger interest suspension claim." In support of this contention, defendant has submitted a computation of the amount of plaintiff's

interest suspension claim had it conceded or lost the DISC issue, calculated by Ms. Maritz, which indicates that the amount would be $932,923.00 as of May 5, 1988.

Moreover, the defendant disputes the plaintiff's legal argument presented above. The computations submitted by defendant in Ms. Martiz's affidavit indicate that plaintiff's statement that "if Computervision had not prevailed on the DISC issue in the Tax Court, Computervision's entitlement to interest suspension would have ended as of March 15, 1984-the due date of its 1983 tax return" is true, but defendant maintains that, if a timely interest suspension claim had been filed, this result would have occurred, regardless of the outcome of the litigation on the DISC issue. Plaintiff, however, erroneously attributes this result to the fact that

> the disqualification of CVI as a DISC would not only have created a $7.8 million deficiency for 1982, but would also have created a $9.5 million deficiency for 1983. As a result, the Unapplied Payments would have ceased to be "unapplied" as of March 15, 1984, the due date of the 1983 return, when they would have been required to be applied to Computervision's 1983 deficiency.

Therefore, plaintiff concludes that: "[a]lthough Computervision would still have been entitled to the first twelve months of interest suspension that it is presently seeking, it would not have been entitled to interest suspension for the last seventeen months, from March 15, 1984, through August 2, 1985."

Defendant, however, argues that, regardless of the outcome of the litigation on the DISC issue (i.e., even if plaintiff won the DISC issue, as in this case), plaintiff

would not be entitled to interest suspension relief after March 15, 1984. Specifically, defendant contests plaintiff's claim that "interest suspension is available from the time a credit-elect overpayment is made" to "the time that the taxpayer's payment is applied to an actual or estimated tax liability, including a deficiency determined for a subsequent year. . . . " As defendant's counsel stated in oral argument, "subsequently determined deficiencies [in this case, for tax year 1983] don't affect interest suspension."

Interest suspension occurs when a taxpayer elects to credit an overpayment of income tax reported on the return for year one against estimated tax for year two; this is known as a "credit-elect." Subsequently, a deficiency of income tax is determined for year one and the credit-elect to year two is not "needed" to satisfy the required payments of estimated tax for that year.[17] As Revenue Ruling 99-40 explains:

> When a taxpayer elects to apply an overpayment to the succeeding year's estimated taxes, the overpayment is applied to unpaid installments of estimated tax due on or after the date(s) the overpayment arose, in the order in which they are required to be paid to avoid an addition to tax for failure to pay estimated income tax under §§ 6654 or 6655 with respect to such year.

Rev. Rul. 99-40, 1999-2 C.B. 441.

As the defendant points out, whether an overpayment for 1982, which the plaintiff elected to credit against the

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[17] As defendant explains, the amount with respect to which interest suspension applies is the lower of the deficiency for year one or the credit-elect which is not needed in year two.

subsequent year's estimated tax, is "needed" to avoid the § 6655 estimated tax penalty for 1983 depends entirely on "the tax shown on the return for the taxable year [1983]," or "the tax shown on the return of the corporation for the preceding taxable year [1982]."[18] IRC § 6655(d). In other words, the deficiency subsequently determined for 1983 due to the IRS' proposed disqualification of CVI as a DISC would not alter the required installments of 1983 estimated tax and, therefore, would not impact the critical question regarding interest suspension: whether the overpayment applied to 1983 was not "needed" so as to avoid estimated tax penalties for that year. Therefore, the plaintiff's contention that its interest suspension claim spanning the period from March 15, 1984 to August 2, 1985 is directly attributable to the DISC issue is not correct, according to the defendant, since plaintiff would

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[18] § 6655 Failure by corporation to pay estimated income tax

(a) Addition to tax

Except as otherwise provided in this section, in the case of any underpayment of estimated tax by a corporation, there shall be added to the tax under chapter 1 for the taxable year an amount determined by applying –

(1) the underpayment rate established under section 6621,

(2) to the amount of the underpayment,

(3) for the period of the underpayment.

(b) Amount of underpayment; period of underpayment

For purposes of subsection (a) –

(1) Amount

The amount of the underpayment shall be the excess of –

(A) the required installment, over

(B) the amount (if any) of the installment paid on or before the due date for the installment.

* * *

(Continued on following page)

not have an interest suspension claim for that period regardless of the outcome of the DISC issue. The court also concludes that the interest suspension claim is not dependent on the resolution of the DISC issue. In short, the $556,355.00 of interest, allegedly "attributable to" the DISC issue, is not, in fact, attributable to the DISC issue, but is a separate claim for interest that should have been explicitly outlined in the original refund claim.

Of the $820,946.13 of interest in dispute, plaintiff claims that $264,591.00 of that amount is "related to [the] DISC issue," but "attributable to other issues."[19] Indeed, in

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(d) Amount of required installments

For purposes of this section –

(1) Amount

(A) In general

Except as otherwise provided in this section, the amount of any required installment shall be 25 percent of the required annual payment.

(B) Required annual payment

Except as otherwise provided in this subsection, the term "required annual payment" means the lesser of –

(i) 100 percent of the tax shown on the return for the taxable year (or, if no return is filed, 100 percent of the tax for such year), or

(ii) 100 percent of the tax shown on the return of the corporation for the preceding taxable year.

Clause (ii) shall not apply if the preceding taxable year was not a taxable year of 12 months or the corporation did not file a return for such preceding taxable year showing a liability for tax.

[19] In its supplemental brief, plaintiff contends that "all of the interest paid by Computervision is related to the DISC issue within the meaning of the refund claim. . . . " Plaintiff's assertion that the entire $4,095,974.00 paid by Computervision is "related to [the] DISC issue," (which is more than the $3,818,707.00 it is currently claiming) is a new claim by plaintiff; not only does it not appear in the original refund claim, but it does not appear in plaintiff's amended refund claim, in its

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its supplemental brief, plaintiff fully concedes that the $264,591.00 amount is attributable to the settled issues, not the DISC issue:

> $264,591 of the disputed interest of $820,946 is attributable to factors other than the DISC issue. . . . Both of those amounts are attributable to, among other factors, the tax deficiency of $2,102,421 that arose from issues settled by Computervision with the Boston Appeals Office of the IRS. The interest that is attributable to the settled issues *and not also attributable to the DISC issue* is therefore $541,858, the sum of $264,591 and $277,267.

(emphasis in original).

Since the plaintiff, itself, concedes that the $264,591.00 amount of deficiency interest is directly attributable to the settled issues, it cannot be associated with the DISC issue.[20] Therefore, the $264,591.00 amount also could not have been subsumed in the original refund claim.

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response brief, or in plaintiff's position presented at oral argument. Indeed, plaintiff's response brief cites to the original refund claim and states: "Computervision's Original Refund Claim specifically sought a refund of '*that portion of* the interest [paid by Computervision in April, 1989] relating to the [DISC] disqualification issue.'" (emphasis added). Up until Computervision submitted its supplemental brief, plaintiff was arguing that only a portion of the interest paid by Computervision was "related to [the] DISC issue." Although plaintiff's claim in its supplemental brief is that all the interest paid by Computervision is "related to the DISC issue," it is only requesting a portion: $3,818,707.00.

[20] While the plaintiff fully concedes that the $264,591.00 amount is attributable to the settled issues, and not the DISC issue, plaintiff argues that this amount is, nevertheless, "related to [the] DISC issue." The plaintiff's argument appears to be based on two errors it believes

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2. Plaintiff was contesting the entire computation of deficiency interest for 1982

The plaintiff also argues that the original refund claim encompasses its interest suspension claim because Computervision is contesting the "entire computation of deficiency interest for 1982." Computervision contends that "by disputing the computation of Computervision's restricted interest for 1982, the Original Refund Claim was sufficient to place the Service's entire computation of deficiency interest for 1982 at issue, including the application of interest suspension." Based on this argument, plaintiff further asserts that a "request for a refund of erroneously-computed deficiency interest requires a computation of the interest properly owed by the taxpayer, and permits the correction of any and all computational errors that would naturally be discovered in making such a computation."

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the IRS made when computing the $4,095,974.00 of restricted interest. First, plaintiff argues that the proposed adjustment of $7,886,409.00 used in the computation was incorrect. It states that "[a]s a result of the Tax Court's decision in favor of Computervision on the DISC issue, the adjustment to Computervision's tax liability should instead have been $2,102,421." Plaintiff states that "[i]t is obvious that the first error relates to the DISC issue because it resulted directly from the IRS's determination that CVI failed to qualify as a DISC." However, both parties identify the $2,102,421.00 amount as related to the settled issues, not the DISC issue. To the extent any error existed, it was the fact that a tax deficiency and corresponding interest were assessed with regard to the DISC issue. Indeed, the defendant has attempted to rectify that error by conceding that plaintiff is entitled to the deficiency interest that corresponds to the DISC issue, $2,997,761.42. However, defendant's acknowledged error with regard to the DISC issue does not affect the tax liability associated with the settled issues, $2,102,421.00, nor the interest assessed on that deficiency.

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Plaintiff's argument is apparently based on the "general" ground for refund that appears in plaintiff's original refund claim. The plaintiff's original refund claim listed the "Grounds for Refund." As noted, the first ground for refund stated: "Primary Issue: DISC Disqualification."[21] The third ground was entitled, "General," and stated:

> Computervision claims as a basis for the refund of the interest paid with respect to its 1982 taxable year such other grounds as are shown to be appropriate by the tax returns, books and records and the Examination Report and related Protest

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The second error cited by the plaintiff is that the methodology of the IRS computation was incorrect because "[r]ather than computing interest based on the size of the adjustment to Computervision's tax liability, the IRS should have computed interest based on the running underpayment balance in Computervision's 1982 tax account, taking into account the suspension of interest due to Computervision's Unapplied Payments, and all of the other payments and credits affecting the account." According to the plaintiff, this error relates to the DISC issue because "in order to *correct* the methodological error in the IRS computation, it was necessary to resolve the DISC issue. Until the DISC issue was resolved, the day-to-day underpayments in Computervision's 1982 tax account could not accurately be computed." (emphasis in original). The plaintiff bases its argument on the government's computations in an April, 2000 letter in which the Department of Justice sent plaintiff revised computations of the refund due to plaintiff: the "government's own computations reflect the fact that an accurate recomputation of the interest due from Computervision required a resolution of the DISC issue. . . . " Despite plaintiff's assertion to the contrary, the government explained in it its brief that the computations cited by plaintiff do not suggest that an accurate recomputation of the interest due from Computervision required a resolution of the DISC issue. The computation merely reflects the fact that an error was made in the computation of interest on the settled issues. The revised computation had nothing to do with the DISC issue, as Ms. Maritz asserted.

[21] The second ground is discussed above in footnote 13 and is not at issue in this case.

> of Computervision and International for their respective tax years ended December 31, 1982 and January 31, 1983.[22]

Plaintiff's argument that its refund claim "has always specifically involved the computation of interest" mischaracterizes the claims in Computervision's original refund claim. The plaintiff never contested the computation of Computervision's restricted interest for 1982. The refund claim did not allege that the method of calculating interest for 1982 by the IRS was erroneous, nor did it even mention the computation of interest. By contrast, the legal issue that formed the basis for plaintiff's refund claim was the IRS proposal to disqualify CVI as a DISC, which resulted in the assessment of a tax deficiency and the accrual of deficiency interest. The plaintiff disagreed with the IRS' decision. Since Computervision contested the IRS' proposed disqualification of CVI as a DISC, it also contested the results of that disqualification, namely, the assessment of deficiency interest with respect to the DISC issue. As defendant states,

> plaintiff was not, as plaintiff alleges "disputing the computation of Computervision's restricted interest for 1982." What plaintiff was disputing was the determination that there was a deficiency for 1982 with respect to the DISC issue. . . . The loss in the Tax Court (and the consequent concession of the DISC issue involved here) effectively resolved this case.

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[22] In addition, in a footnote on the first page of plaintiff's July 28, 1989 claim for refund, the stated amount to be refunded, $2,808,888.00, is listed, followed by the clause, "or other amount that may be legally allowable."

Since the Tax Court issued a final decision on the DISC issue, finding that CVI was not qualified as a DISC, it is undisputed that the plaintiff is entitled to the interest associated with the DISC dispute. The remaining deficiency interest for the 1982 tax year, to which interest suspension potentially would be applied, stems from other previously settled issues and is a wholly separate issue, unrelated to the DISC issue, as demonstrated above.

Therefore, contrary to plaintiff's assertion that its claim "is sufficiently broad to permit the correction of other errors that are apparent in the same computation, or that would necessarily be considered in the course of correcting the first error," alleged errors in the computation of deficiency interest related to the settled issues would not be included in a legal dispute as to whether CVI qualified as a DISC for tax purposes; nor would such computational errors, as plaintiff alleges, "necessarily be considered in the course" of determining whether CVI qualified as a DISC for tax purposes. Indeed, the plaintiff's own interest computations, as of September, 1999, demonstrate that the interest suspension relief that plaintiff is seeking is not "a necessary step in completing the interest computation that was explicitly placed at issue in the Original Refund Claim," as plaintiff alleges. Therefore, the plaintiff's reliance on cases to support this proposition is misplaced. *Burlington N., Inc. v. United States,* 231 Ct. Cl. at 226-28, 684 F.2d at 869-70 (holding that the use of past retirement data was not at variance with the ground for recovery outlined in its refund claims; the use of past retirement data did not constitute a new or different ground for recovery because the use of past retirement data was required to resolve the plaintiff's original claim); *Red River Lumber Co. v. United States,*

134 Ct. Cl. 444, 446, 139 F. Supp. 148, 149-150 (1956); *Harry Ferguson, Inc. v. United States,* 137 Ct. Cl. 137, 140-41, 146 F. Supp. 836, 839-41 (1956).

Moreover, the general ground for refund cited in the original refund claim, alone, is not "sufficient to place the Service's entire computation of deficiency interest for 1982 at issue, including the application of interest suspension." The case law indicates that a general ground for refund in a refund claim cannot be employed by a taxpayer to assert later in a suit, what is in reality, a wholly separate, independent legal claim. For instance, in *United States v. Andrews,* the taxpayer claimed a refund based on a specific ground and also requested "any greater sum which might be ascertained to be due. . . . " *United States v. Andrews,* 302 U.S. 517, 524 (1938). After the statutory period for raising new claims had expired, the taxpayer requested a greater amount on the basis of the misclassification of an item as a dividend. *Id.* at 518, 525. The United States Supreme Court held that the additional claim was not encompassed within the original refund claim and the plaintiff's attempted amendment was found to be untimely. *Id.* at 520, 525-26.

In *Mobil Corporation v. United States,* the plaintiff, in its original refund claim, requested a refund of taxes in addition to a general "catch-all" request for interest: " 'plus interest on such amount or such greater amount of tax and interest as may be legally refundable on such taxes and interest.' " *Mobil Corp. v. United States,* 52 Fed. Cl. at 332. The court found that this general statement does not state

> the particular ground upon which plaintiff relies to support this suit. The notation alone amounts to nothing more than a plea for all payments to which plaintiff is legally entitled. It does not

> satisfy the requirement that the taxpayer "set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof."

Id. Therefore, the court concluded that the additional amount plaintiff sought "because of the IRS' alleged miscalculation is based on a separate legal theory that plaintiff was obligated to disclose in its claim." *Id.* at 333.

In addition, the plaintiff in *Mobil Corporation v. United States* promulgated an argument that is similar to the plaintiff's argument in this case. In *Mobil Corporation,* plaintiff stated that general instructions in a particular form, similar to the general ground listed here, required the "IRS to evaluate all potential grounds for a refund regardless of whether the taxpayer reasonably has brought such grounds to its attention." *Id.* at 334. In response to such an assertion, the court found that "[s]uch an interpretation would place the instructions in direct conflict with Treas. Reg. § 301.6402-2(b), the Variance Doctrine." *Id.*

Similarly, in this case, despite plaintiff's contention that its "general claim, together with its specific claim, put the IRS on notice that the restricted interest computation for 1982 was disputed," the interpretation that a claim for deficiency interest attributable to the settled issues is permitted in this suit based on the general ground for refund in the original refund claim would be in direct contravention of Treas. Reg. § 301.6402-2(b). The general refund language does not satisfy the requirement that the taxpayer "set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." Treas. Reg.

§ 301.6402-2(b)(1). As noted, "the importance of a proper refund claim is 'to prevent surprise and to give adequate notice to the Service of the nature of the claim. . . .'" *Mobil Corp. v. United States,* 52 Fed. Cl. at 333 (quoting *Alexander Proudfoot Co. v. United States,* 454 F.2d at 1383). The IRS could not possibly infer, nor is it required to infer, from the general, "catch-all" language referring to interest paid with respect to its 1982 tax year that the plaintiff was actually asserting an interest suspension claim with regard to a tax deficiency attributable to issues that were settled prior to the claim. As defendant notes, the

> language is nothing more than an open invitation to the IRS to examine every document relating to plaintiff's year ending December 31, 1982, and the taxable year of its DISC ending January 31, 1983, in order to determine any basis for refund. It is in no sense the precise statement of the facts and the grounds asserted for relief. . . . The IRS has no obligation to accept such an invitation.

3. The Interest Suspension Claim Arose During the Process of Addressing the Original Refund Claim.

Finally, plaintiff argues that, because the interest suspension claim arose "during the process of addressing the original refund claim," the interest suspension claim is not at variance with the original refund claim. The plaintiff is referring to Joint Exhibit 19, which is a letter, dated August 17, 2000, from Mr. Maurer of the IRS Office of Chief Counsel to plaintiff's counsel. The letter states: "This refers to your letter of May 2, 2000, regarding interest netting. . . . We enclose a copy of interest computations prepared by the Appeals Audit Staff." Attached to

this letter is an IRS Memorandum, dated August 1, 2000, addressed to Mr. Maurer from Ms. Marchand, a Restricted Interest Examiner for the IRS, which outlines the interest computations referred to in the cover letter. The computations apply interest suspension to the overpayment in years 1982 and 1983. For 1982, the memorandum stated: "Revenue Ruling 99-40 (Sequa) is applied regarding the credit elect to 1983. No claim is necessary." Based on Joint Exhibit 19, the plaintiff argues that the "fact that the government, and not Computervision, identified the issue demonstrates that the issue was adequately raised by the Original Refund Claim and precludes a finding of variance."

In response, the defendant maintains that the interest suspension issue did not, in fact, arise during the process of addressing the claim for deficiency interest attributable to the DISC issue, the subject of the original refund claim. Rather, it arose in response to the "interest netting" claim raised by the plaintiff in May of 2000. As defendant notes, on May 2, 2000, plaintiff sent two letters: one to Mr. Maurer, IRS District Counsel, with respect to tax years 1983 and 1984, pending in the Tax Court, and a second to defense counsel and Mr. Markham at the Department of Justice with respect to tax year 1982, the subject of the case before this court. As in the letter to the IRS, in the letter to the Department of Justice, plaintiff stated: "We are writing pursuant to Revenue Procedure 99-43 to request the application of a net interest rate of zero to certain portions of the interest computation in the captioned case." In this letter, the plaintiff raised the issue of

interest netting for the first time; it was not included in the original refund claim.[23]

As defendant notes, in response to this letter from plaintiff's counsel, in which plaintiff raises the new claim of interest netting, the IRS made the interest computations that plaintiff is highlighting. This fact is evident from the first line of the IRS' letter, which reads: "[t]his refers to your letter of May 2, 2000, regarding interest netting. . . . " In other words, contrary to plaintiff's assertion, the interest suspension issue did not arise in the process of addressing the original refund claim; that is, in determining the deficiency interest attributable to the DISC issue. The interest suspension issue arose in response to the plaintiff's alternative interest netting claim, which would result in relief identical to the plaintiff's interest suspension claim.[24] Indeed, as plaintiff's own

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[23] Unlike plaintiff's interest suspension claim, the defendant maintains that the doctrine of variance does not apply to the interest netting claim raised by the plaintiff.

[24] Apparently, the IRS' application of interest suspension in response to the plaintiff's claim of interest netting was simply a mistake. Defendant claims that "[i]t is easy to understand how the global interest netting claim triggered consideration of interest suspension. . . . [E]ach provides relief identical to the other – the reason being that each claim is the converse of the other." Therefore, "the global interest netting claim . . . was very close to the functional equivalent of a claim specifically requesting" interest suspension relief, which defendant claims was time barred. Defendant further argues that:

> Under these circumstances, with 1982, 1983 and 1984 before her, it is easy to understand how [Restricted Interest Examiner] Ms. Marchand might apply Rev. Rul. 99-40 [interest suspension] (clearly applicable to 1983 and 1984) to 1982 as well, not recognizing that the fact that no formal claim is required does not obviate the necessity that some claim for interest suspension, whether formal or informal,

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1999 interest computations make clear, interest suspension with regard to the settled issues is a separate issue from the deficiency interest attributable to the DISC issue.

In sum, the plaintiff's main contention underlying its three sub-arguments, discussed above, is that the original refund claim encompasses the interest suspension claim. The plaintiff attempts to link its interest suspension claim to the DISC issue by arguing, in essence, that they both concern deficiency interest for tax year 1982. However, the fact that plaintiff's belated interest suspension claim and the DISC issue both implicate interest for 1982 is not dispositive. The crucial point is that plaintiff is attempting to link two separate tax deficiencies that both happen to have corresponding deficiency interest for tax year 1982. As previously noted, one tax deficiency is attributable to issues that were settled prior to the filing of the original refund claim. The other tax deficiency relates to the DISC issue, the subject of the original refund claim. As defendant notes, despite the fact that the original refund claim is only requesting interest associated with the DISC issue, it is still related to the DISC tax deficiency:

> [T]he DISC claim asserted in the claim for refund and complaint is just as much a substantive tax claim as it would be had there been no carryback. The fact that the carryback from 1985 eliminated the tax liability for 1982 does not make the April 28, 1989 claim any less a claim for refund of the interest attributable to the DISC issue.

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be filed within the time specified by § 6511. Ms. Marchand had no authority to waive the statute of limitations.

Therefore, when examining the interest in dispute in this case, it is necessary to link the interest to their respective principals because, as the Court of Claims has stated, under the tax laws, "deficiency interest has been so closely braided to principal that it has been deemed an integral part of the tax." *Alexander Proudfoot Co. v. United States,* 197 Ct. Cl. at 226, 454 F.2d at 1382.

As demonstrated, plaintiff's interest suspension claim, if permitted, would be applied to the tax deficiency associated with the settled issues, not the DISC issue. Indeed, the parties agree that plaintiff is entitled to all the deficiency interest directly associated with the DISC issue, so an interest suspension claim with regard to that issue is not required. The original refund claim was specific in nature, seeking IRS action on a theory wholly unrelated to Computervision's present claim for additional deficiency interest. It did not address a claim for deficiency interest assessed for plaintiff's 1982 tax year beyond that which may be directly associated with the DISC issue. The original refund claim did not include, explicitly or implicitly, a claim that interest suspension be applied to interest assessed on a deficiency corresponding to issues that were settled prior to the filing of the claim. Therefore, since the interest suspension claim is related to a tax deficiency that is not the subject of the original refund claim, the interest suspension claim is not encompassed within the original refund claim. This finding is consistent with the "IRS's longstanding practice of treating each tax liability as separate and distinct, a position that has been upheld by the federal courts on several occasions." *Fed. Nat'l Mortgage Ass'n v. United States,* 56 Fed. Cl. 228, 231 (2003), *rev'd and remanded on other grounds,* No. 03-5162, 2003 U.S. App. LEXIS 16588, at *1 (Fed. Cir. Aug. 12, 2004).

The case currently before the court can be analogized to *John B. Lambert & Assocs. v. United States,* 212 Ct. Cl. at 71. In that case, the court held that deficiency interest was not recoverable due to the plaintiffs' failure to raise the interest issue in their administrative claims for refund. *Id.* at 86. Specifically, the court found that the interest claim was not tied to the lawfulness of the principal tax, but was an independent claim for pre-notice interest, which, therefore, was "clearly not presented":

> Thus, in reality, the taxpayers had limited their claims for refund to the validity of the underlying tax, and interest, to the extent that it was also being contested, was tied entirely to the lawfulness of the principal tax. An independent claim for "pre-notice" interest was clearly not presented. And, on the basis of what was said in the refund claims, it would be inappropriate to infer notice of such a claim now.

Id. at 87. As the defendant argues, the plaintiff "cannot bootstrap its independent claim for deficiency interest based on interest suspension into its earlier specific claim for interest based on the DISC issues. Such a claim was not presented to the IRS in a timely manner." The interest suspension claim is a wholly separate, independent legal theory, which is not "tied entirely to the lawfulness" of the DISC disqualification issue. *Id.*

The finding of substantial variance in this case also is consistent with this court's findings in *Mobil Corporation v. United States* and *Four Star Oil & Gas Company v. United States.* In *Mobil Corporation,* the taxpayer claimed a refund of tax in 1981 and 1983. *Mobil Corp. v. United States,* 52 Fed. Cl. at 328. In 1992, the taxpayer claimed additional interest, contesting the method employed by the

IRS in calculating the deficiency interest. *Id.* The court considered whether plaintiff's original claim for refund included the claim for additional interest. *Id.* at 333. Although the taxpayer in *Mobil Corporation* may have been entitled to the deficiency interest directly associated with the amount of the refund itself, the court determined that the portion sought as a result of an "alleged miscalculation is based on a separate legal theory that plaintiff was obligated to disclose in its [earlier] claim." *Id.*

Similarly, in *Four Star Oil & Gas Company,* the taxpayer also argued that an earlier claim for a refund of tax with corresponding interest embraced a later claim for a refund of additional deficiency interest on a different theory. *Four Star Oil & Gas Co. v. United States,* 49 Fed. Cl. at 761-62. In that case, the court agreed with the defendant that "nothing in the claim filed on November 11, 1992 [the earlier claim] raised the issue of the claimed impropriety of the Service's computation of interest. . . . " *Id.* at 762. The *Four Star Oil & Gas* court distinguished *Deluxe Check Printers, Inc. v. United States,* 15 Cl. Ct. 175 (1988), *rev'd in part on other grounds sub nom. Deluxe Corp. v. United States,* 885 F.2d 848 (Fed. Cir. 1989), by stating:

> The Federal Circuit did, in fact, find that a tax had been incorrectly assessed and ordered that the tax and the interest paid on that tax be refunded. The taxpayer's entitlement to interest did not depend on the merits of a separate claim, however; the interest refunded was merely the interest that had been erroneously assessed and paid, plus the interest accrued on that overpayment. Here, plaintiff's claim for interest is based on grounds unrelated to its 1992 claim for "abandoned geological and geophysical costs allocated

> . . . to its mineral properties." The partial allowance of the 1992 claim did not "automatically" entitle plaintiff to a refund of the deficiency interest assessed for the period March 1, 1981 through December 31, 1982 . . . a timely claim for refund based on a specific claim cannot make an otherwise untimely suit based on an unrelated claim timely.

Four Star Oil & Gas Co. v. United States, 49 Fed. Cl. at 762-763 (citations omitted).

Similar to the plaintiffs in *Mobil Corporation* and *Four Star Oil & Gas,* Computervision did not disclose the separate legal theory, that the IRS should apply the principle of interest suspension when calculating deficiency interest related to the settled issues, in its original refund claim requesting deficiency interest associated with the DISC issue. The plaintiff, however, argues that this case is different from *Four Star Oil & Gas Company v. United States* and *Mobil Corporation v. United States,* and more akin to *Harry Ferguson, Inc. v. United States* and *Red River Lumber Company v. United States.* Plaintiff argues that, while "Computervision's original claim specifically and exclusively sought a recomputation of deficiency interest," in *Mobil Corporation* and *Four Star Oil & Gas Company,* "the taxpayers originally sought *tax* refunds, and then each subsequently raised a computational point relating to the *interest* it had paid." (emphasis in original).

The distinction Computervision is attempting to draw appears to be that plaintiff's case can be distinguished because both the original refund claim and the claims before this court concern deficiency interest for 1982. The relevant point of *Mobil Corporation* and *Four Star Oil &*

Gas Company, however, is that the court found that the claims that appeared in the plaintiffs' original refund claims were different from the claims that formed the basis of the plaintiffs' suits in court. As a result, those suits were dismissed under the doctrine of substantial variance. The fact that the subject matter of the original refund claims dealt with taxes, while the plaintiffs' later claims dealt with interest, is of no real consequence. Similarly, in this case, the legal ground for the original refund claim for interest was that the IRS made an erroneous determination on the DISC issue, while in the suit before this court, the plaintiff is requesting additional interest on the basis of a new legal theory, interest suspension. As the defendant underscores, Computervision "seeks belatedly to tack on to a substantive tax dispute [the DISC issue] a new legal issue concerning interest."

Moreover, *Mobil Corporation* and *Four Star Oil & Gas Company* serve to corroborate, rather than detract from, the finding of substantial variance in this case. In both *Mobil Corporation* and *Four Star Oil & Gas Company,* as plaintiff notes, the plaintiffs sought tax refunds, and then subsequently raised an issue with regard to the interest they had paid. *See Mobil Corp. v. United States,* 52 Fed. Cl. at 329; *Four Star Oil & Gas Co.,* 49 Fed. Cl. at 761-762. However, in each case, the interest was directly related to the taxes that formed the bases of the original refund claims. Despite the fact that "deficiency interest has been so closely braided to principal that it has been deemed an integral part of the tax," the court found that the claims relating to interest raised new legal theories that were not included in the refund claim and, therefore, were barred by the doctrine of substantial variance. *Alexander Proudfoot Co. v. United States,* 197 Ct. Cl. at

227, 454 F.2d at 1382. In Computervision's case, the interest in dispute relates to a tax deficiency that is wholly unrelated to the interest and corresponding tax deficiency at issue in the original refund claim. Therefore, the contention that variance exists in the present case is, arguably, stronger relative to *Mobil* and *Four Star* because the relationship between two tax deficiencies (that is, the settled issues and the DISC issue) is further removed than that between a tax deficiency and its corresponding interest. To extend the metaphor from *Alexander Proudfoot Company, id.*, "the hair is to go with the hide," *id.* at 1382, this case presents the "hair of two different hides," or the interest of two different tax deficiencies.

Furthermore, contrary to plaintiff's assertion, this case is not similar to *Harry Ferguson, Inc. v. United States,* or *Red River Lumber Company v. United States.* Unlike the present case, in both *Ferguson* and *Red River Lumber Company,* the claims raised before the court were sufficiently related to the original refund claims to be encompassed by them. *Harry Ferguson, Inc. v. United States,* 137 Ct. Cl. at 143; *Red River Lumber Co. v. United States,* 134 Ct. Cl. at 446. Plaintiff cites to the following language in *Red River Lumber Company v. United States*: "If the Commissioner fails to allow the refund and the case comes to court, we see no reason why errors which do not affect the right of recovery, but only the amount of recovery, should be perpetuated." *Red River Lumber Co. v. United States,* 134 Ct. Cl. at 446. In this case, the failure to apply interest suspension with regard to the settled issues cannot be characterized as an "error[ ] which [does] not affect the right of recovery, but only the amount of recovery" because the plaintiff does not have a right to recover interest associated with the settled issues since

the interest suspension claim was not included explicitly or implicitly in the original refund claim. *Id.*

Since the interest suspension claim was not encompassed within the original refund claim either explicitly or implicitly, the original claim could not reasonably provide notice to the IRS of that claim. Indeed, the confusing nature, in some instances, of plaintiff's arguments as to why its original refund claim allegedly includes its interest suspension claim provides support for the IRS regulation requirement that taxpayers specifically articulate each of their claims. Simply stated, an examination of the original refund claim in this case indicates that the primary legal issue in dispute is whether the IRS erroneously determined that plaintiff's subsidiary, CVI, does not qualify as a DISC. Plaintiff's original refund claim simply does not suggest to the IRS that plaintiff is seeking deficiency interest for the 1982 tax year unrelated to the DISC issue, based on the principle of interest suspension. Indeed, plaintiff's interest suspension claim is based, not only on a different legal theory, but on a different tax deficiency, which are facts that plaintiff failed to disclose in its original refund claim.

Additionally, the IRS regulations require that "the taxpayer submit with its tax refund claim the supporting evidence necessary to prove its claim." *Lockheed Martin Corp. v. United States,* 210 F.3d at 1371; *see also* § 301.6402-2(b)(1). The original refund claim submitted to the IRS does not provide the evidence necessary to support a claim that the IRS erroneously failed to apply interest suspension to interest associated with the settled issues. Plaintiff's original refund claim did not refer to facts, revenue rulings, or case law to support the notion that the

principle of interest suspension should have been applied to deficiency interest associated with the settled issues.

Furthermore, the court notes with significance that plaintiff is requesting interest suspension for a period, from March, 1984 to August 2, 1985, that the defendant maintains is not permitted under any circumstances by the current law regarding interest suspension. Therefore, even assuming, *arguendo,* that plaintiff's interest suspension claim was somehow subsumed, covertly, in the original refund claim, as plaintiff now argues, there was simply no way the IRS could have been on notice that plaintiff was requesting a greater degree of interest suspension than the defendant believes the current law permits.[25]

Finally, as late as September of 1999, after the DISC issue had been fully resolved, plaintiff concedes that it still was not claiming interest suspension. This concession serves as additional proof that plaintiff did not contemplate such a claim in its original refund claim. Simply stated, if plaintiff was not making a claim for interest suspension as late as 1999, how could the IRS have had notice of such a claim in 1989, ten years earlier? It is not the responsibility of the IRS to formulate claims for a taxpayer, nor should that agency have to speculate as to what claims plaintiff may or may not be making in its own refund claim, beyond what is actually, explicitly claimed. Presumably, it is for that very reason § 301.6402-2(b)(1) mandates that a taxpayer's claims be explicitly stated.

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[25] The fact that, according to the plaintiff, interest suspension for that additional period would not have materialized without plaintiff's win on the DISC issue is of no consequence because plaintiff had a potential claim for interest suspension regardless of the outcome of the DISC litigation.

In short, plaintiff has failed to "set forth in detail each ground upon which a credit or refund is claimed" in its original refund claim and, therefore, the original refund claim was not "sufficient to apprise the Commissioner of the exact basis thereof." § 301.6402-2(b)(1). The IRS is "entitled to take [the claim] at face value and to examine only the points to which it directed his attention." *United States v. Garbutt Oil Co.*, 302 U.S. 528, 533 (1938). Computervison's present claim for additional interest corresponding to the settled issues on the basis of the principle of interest suspension, therefore, substantially varies from the original refund claim submitted in 1989.

B. Waiver

The plaintiff makes an alternative claim that, if the original refund claim, itself, is insufficient to provide a basis for the present suit, the IRS may have waived its own regulation. Indeed, the United States Supreme Court has recognized that the IRS does possess the authority to waive certain applicable regulations. *See Angelus Milling Co. v. Commissioner,* 325 U.S. 293, 297 (1945), *reh'g denied,* 325 U.S. 895 (1945). As previously noted, § 301.6402-2 provides that a taxpayer must "set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." The plaintiff contends that "the government can waive the specificity requirement of Treas. Reg. § 301.6402-2 by considering on the merits an issue that is not set forth in detail in the taxpayer's formal refund claim."

According to the plaintiff, the defendant "waived the variance defense (i) by a course of conduct in which it consented to make all proper computational adjustments,

and (ii) by allowing interest suspension relief to Computervision *sua sponte,* including an explicit statement that 'no claim [was] necessary' for such relief." (alteration in original). The plaintiff is specifically referring to correspondence it engaged in with the IRS regarding the refund computations after the resolution of the DISC issue in the Tax Court litigation. During the course of that correspondence, in August of 2000, the IRS responded to a letter from Computervision regarding interest netting with revised interest computations that applied Revenue Ruling 99-40 to suspend the accrual of deficiency interest. In a memorandum attached to the letter, the IRS applied the principle of interest suspension to tax year 1982 and stated "Revenue Ruling 99-40 (Sequa) is applied regarding the credit elect to 1983. No claim is necessary." The Department of Justice received a copy of the IRS computations from the IRS in September of 2000. On October 25, 2000, the Department of Justice sent plaintiff a letter, specifically disputing the application of interest suspension to tax year 1982 "*absent the filing of a timely claim for refund raising the issue.*" (emphasis in original). Despite this rejection of its interest suspension claim by defendant, plaintiff argues that "[i]t is perfectly clear from that statement that the Service had specifically considered the variance issue, and intentionally waived any requirement of a specific claim for interest suspension."

The defendant first disputes the plaintiff's contention that the IRS memorandum, cited above, can be construed as a waiver of the variance doctrine by the defendant. Specifically, the defendant maintains that the August 1, 2000 IRS memorandum cannot constitute a waiver, because, pursuant to Section 5 of Executive Order No.

6166,[26] as of the filing date of the complaint in this case, in 1990, the Department of Justice, not the IRS, had jurisdiction over this litigation. Therefore, according to the defendant, the IRS did not have the authority to waive any claims in this case in August of 2000.

The court need not resolve the issue as to whether the IRS possessed the authority in 2000 to waive the claim specificity requirement in this case, nor whether the IRS' conduct can fairly be characterized as a waiver. Even assuming, *arguendo,* that the IRS could have waived claims in this suit in 2000, and that its conduct in this case constituted a waiver, the concept of waiver was simply not implicated in this case and the alleged waiver was outside the statute of limitations.

In *United States v. Andrews,* the United States Supreme Court addressed the waiver of IRS regulations governing specificity of claims. *United States v. Andrews,* 302 U.S. at 525. In *Andrews,* the Supreme Court indicated that where a specific claim, not a general claim, was filed with the IRS, which "pointed unerringly to the items the Commissioner must consider," no waiver of the regulation requiring specificity is implicated. *Id.* In other words, the present case is not a case in which the taxpayer failed to

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[26] § 5. Claims By or Against the United States

> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

Exec. Order No. 6166, § 5 (June 10, 1933), *reprinted following* 5 U.S.C. § 901 (2000).

comply with the IRS regulation requiring claim specificity by filing a general or informal claim for refund, and then, subsequently, the IRS affirmatively considered the taxpayer's claim on the specific merits plaintiff allegedly intended. By contrast, Computervision's original refund claim was specific and pointed clearly to the claim the IRS was requested to consider. The original refund claim listed "DISC Disqualification" as the "primary issue" under "grounds for refund." The claim further stated that "the Examination Report erroneously proposed to disqualify the DISC for its taxable year ending January 31, 1983. . . . Computervision disagrees with this conclusion and is hereby making this claim for refund for the portion of the interest paid that is attributable to the disqualification of International as a DISC for its fiscal year ending January 31, 1983." While the original refund claim "pointed unerringly to the items the Commissioner must consider," it does not notify the IRS of an interest suspension claim with regard to the settled issues. *United States v. Andrews,* 302 U.S. at 525. In this case, the IRS Commissioner did not waive the requirement that Computervision provide the specific grounds and factual details to support its refund claim, for "[t]here was no need for him to do so." *Id.* Simply stated, the claim was very specific and waiver is inapplicable under the facts presented.

Moreover, even if the concept of waiver were implicated in this case, it would be barred by the statute of limitations. The conduct that plaintiff maintains constituted a waiver occurred in 2000, nine years after the statute of limitations for filing a refund claim expired in 1991. A valid waiver, however, must occur within the applicable statutory time period. As this court stated in *Mobil Corporation v. United States*:

> If a claim does not satisfy the requirements of a particular regulation, but IRS waives that regulation prior to expiration of the applicable limitations period, the claim can be said to have been brought within the statutory limitations period, fully in accordance with "the regulations of the Commissioner."
>
> Where a purported waiver occurs after expiration of the statutory period, as here, the requirements of I.R.C. § 7422 have not been met. The claim is not "duly filed" because the statutory limitations period for filing a proper claim had expired by the time the actions that allegedly resulted in a waiver occurred. Because plaintiff did not satisfy IRS regulations or secure a waiver of those regulations within the statutory period, plaintiff did not "duly file" a claim "according to the provisions of law . . . and regulations of the Commissioner."

Mobil Corp. v. United States, 52 Fed. Cl. at 337 (quoting I.R.C. § 7422) (omission in original); *see also Sicanoff Vegetable Oil Corp. v. United States,* 149 Ct. Cl. 278, 285, 181 F. Supp. 265, 268 (1960) ("Section 322, after prescribing the periods within which claims for refund may be filed, says 'no credit or refund shall be allowed after the expiration of whichever of such periods expires the later.' That statutory language does not leave much leeway for the application of any doctrine of waiver when a valid claim has not been filed in time. . . . In the instant case the Commissioner, in considering the plaintiff's claim, which was based upon a ground which had existed and had not been asserted for six years, was, presumably by mistake, considering a claim long since barred by the statute of limitations. He was not permitted by law to pay such a claim, and his consideration of it could not enlarge his

legal authority."). Since the alleged waiver in this case occurred after the statute of limitations expired, the plaintiff's waiver claim must fail. As this court has noted, "[i]f IRS could waive statutes or regulations related to limitations in these circumstances, it could require the Government to make a payment that legally it was not obligated to pay." *Mobil Corp. v. United States,* 52 Fed. Cl. at 337 (citing *Finn v. United States,* 123 U.S. 227 (1887)).

C. Amendment

Plaintiff also argues that it properly amended its original refund claim to raise the issue of interest suspension, despite the fact that the amended claim was filed in 2002, after the statute of limitations for the filing of claims had expired. In certain instances, amendments to a properly filed claim are permitted after the statutory period has expired. *Mobil Corp. v. United States,* 52 Fed. Cl. at 335. Specifically, to be valid, amendments must comply with two requirements: first, they must be "germane" to the original claim, and second, they must be presented before the original claim has been resolved. *Crompton Corp. v. United States,* 2003 U.S. Claims LEXIS 211, at *15 (citing *United States v. Andrews,* 302 U.S. at 525); *Mobil Corp. v. United States,* 52 Fed. Cl. at 335.

1. The "Germane Requirement"

A new ground for refund may be raised in an amended claim if the new ground is "germane" to the original, timely filed claim. *Mobil Corp. v. United States,* 52 Fed. Cl. at 335. In *United States v. Andrews,* the United States Supreme Court explained this requirement:

> Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, has not misled him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within his knowledge, or which, in the course of his investigation, he would naturally have ascertained, is permissible. On the other hand, a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim.

United States v. Andrews, 302 U.S. at 524. Similarly, in *Consolidated Coppermines Corporation v. United States,* the United States Court of Claims stated: "Where the amendment is inconsistent with the former claim, or has injected new and unrelated matter, we have not allowed it, but where it is germane to the original claim and sets up matter discovered in the course of the investigation of the original one, we have allowed it." *Consol. Coppermines Corp. v. United States,* 155 Ct. Cl. 731, 736, 296 F.2d 743, 745 (1961).

The plaintiff's amended claim, which raised the issue of interest suspension with regard to tax year 1982, cannot be characterized as "germane" to the original refund claim concerning the DISC issue. As set forth in detail above, the original refund claim did not raise the interest suspension claim explicitly, nor implicitly, and therefore, the IRS was not notified as to plaintiff's claim. Plaintiff's 2002 interest suspension claim, therefore, did not "merely make[]

more definite the matters already within [the IRS'] knowledge" from an examination of the original refund claim. *United States v. Andrews,* 302 U.S. at 524.

Also, as explained previously, nor would the IRS "naturally have ascertained" the interest suspension claim during "the course of [its] investigation." *Id.* As in *Mobil Corporation,* the potential amended claim would not render sufficiently specific a "too general claim" because plaintiff's original refund claim was specific as to "the disputed legal issue and the relief sought." *Mobil Corp. v. United States,* 52 Fed. Cl. at 336; *see also Crompton Corp. v. United States,* 2003 U.S. Claims LEXIS 211, at *16-17 (quoting *Mobil Corp. v. United States,* 52 Fed. Cl. at 335). Plaintiff requested a refund of deficiency interest resulting from a legal dispute as to whether its subsidiary qualified as a DISC. The original refund claim did not allege an error in the IRS' calculation of deficiency interest unrelated to the DISC issue. An IRS investigation into the DISC dispute would "naturally" focus only on the legal issues surrounding the disqualification of CVI as a DISC.

The amended refund claim, therefore, raises a new and independent claim for the application of interest suspension to interest related to the settled issues for tax year 1982, which is not "germane" to the claim in the original refund claim. As the United States Supreme Court has stated, plaintiff's position, that "a claim limited to a specified item might be amended out of time to seek a refund on account of other and unrelated items," is untenable. *United States v. Andrews,* 302 U.S. at 527.

2. Timing Requirement

The fact that the amended refund claim was not germane to the original refund claim effectively disposes of plaintiff's amendment argument. However, the court notes that the amended refund claim also should be rejected because the original refund claim was no longer pending and, as previously noted, the statute of limitations had expired at the time the amended claim was submitted.

An amendment to a refund claim submitted after the expiration of the applicable statute of limitations may only be made if the original claim is still pending. *See Allstate Ins. v. United States,* 213 Ct. Cl. 96, 104, 550 F.2d 629, 633 (1977) ("It is a rule of long standing that once a refund claim has been disallowed, it is not subject to amendment."); *see also Union Pac. R.R. Co. v. United States,* 182 Ct. Cl. at 116-17 ("The disposition of a taxpayer's refund claim by allowance of the amount requested in full, however, precludes an amendment asserting an additional amount after the expiration of the statutory period for refund."); *Crompton Corp. v. United States,* 2003 U.S. Claims LEXIS 211, at *15. Absent such a principle, a taxpayer would be permitted to amend any refund claim in perpetuity. *See Mut. Life Ins. Co. of N.Y. v. United States,* 72 Ct. Cl. 204, 209, 49 F.2d 662, 664, *cert. denied,* 284 U.S. 628 (1931) ("A claim that has been rejected may not be amended after the statute of limitation has expired. *Sugar Land Railway Co. v. United States,* [71 Ct. Cl. 628,] 48 F.2d 973, decided April 6, 1931, by this court. To hold that a claim for refund made on a specific ground may, after it has been considered and rejected, be amended or enlarged so as to include an entirely different ground . . . would be

to permit an indefinite postponement of the limitation for bringing suit and would nullify the provisions of the statute as to the time within which claims may be filed and the time within which suit may be brought."); *Mobil Corp. v. United States,* 52 Fed. Cl. at 336.

The original refund claim in this case was filed on August 4, 1989. Before the IRS acted on the original refund claim, plaintiff filed its complaint in this court on April 4, 1990. The amended refund claim was filed in 2002. It is upon these facts that the plaintiff bases its assertion that its "amended claim is timely because it was filed before any final resolution of the Original Refund Claim." In other words, according to the plaintiff, the original refund claim is still pending because it is before this court. However, the reference to a pending claim in the case law is to a claim that is pending before the IRS, not the court. As defendant maintains, "[t]he April 28, 1989 claim was pending before the IRS from that date until suit was filed on April 4, 1990. On that date, the IRS' jurisdiction over the claim terminated. It could not compromise the case; it could not concede the case; it could not litigate the case." *See* Exec. Order No. 6166, § 5 (June 10, 1933), *reprinted following* 5 U.S.C. § 901(2000). In other words, although the original refund claim was filed with the IRS, the IRS was not given the opportunity to resolve the claim because the plaintiff chose to file suit in this court before the IRS had a chance to investigate its claims. Since it is the plaintiff who precluded a final resolution of its original refund claim by the IRS, the plaintiff cannot argue before this court that it can properly amend that original claim out of time because the claim remains pending due to the IRS' perceived failure to act.

The finding of a properly amended claim in this case would permit taxpayers to contravene § 7422(a) directly and avoid a fundamental requirement of administrative law; namely, that the "[t]he only claim which may be presented to a court is one which the agency had the opportunity to consider," as defendant states. As noted above, absent such a principle, a taxpayer would be permitted to amend any refund claim in perpetuity, which is exactly what occurred in this case; the plaintiff amended its claim in 2002, thirteen years after it filed its original refund claim.

In short, the plaintiff cannot, now, raise an interest suspension claim in this court by employing an amended refund claim and arguing that the original refund claim remains pending. The plaintiff's amended refund claim fails to meet the legal standard governing such claims because it is not germane to the original claim, nor was it submitted while the original refund claim remained pending. In conclusion, pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims the plaintiff's interest suspension claim is dismissed under the doctrine of substantial variance.

II. Interest Netting Claim

In addition to its interest suspension claim, plaintiff makes an alternative claim for "interest netting."[27]

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[27] Plaintiff uses the term, "interest netting," or "interest rate netting," based on § 6621(d), which refers to the "net rate of interest." The term, "global interest netting," also is used.

The "interest netting" dispute in this case stems from § 6621(d), which reads:

> (d) Elimination of interest on overlapping periods of tax overpayments[28] and underpayments – To the extent that, for any period, interest is payable under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the same tax payer of tax imposed by this title, the net rate of interest under this section on such amounts shall be zero for such period.

Section 6621(d) was enacted in 1998 to eliminate the interest differential, created by the Tax Reform Act of 1986, in which the IRS collected interest on tax under payments by corporate taxpayers at a higher rate than it paid interest on tax overpayments.[29] *Federal Nat'l*

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[28] An "overpayment" exists when a taxpayer "has paid as an installment of the tax more than the amount determined to be the correct amount of such installment." IRC § 6403. The United States Court of Claims explained the concept of overpayment interest as interest that "is paid by the United States, not as a refund of interest previously paid by the taxpayer on demand of the Service, but simply because the Government has had the use of money found to belong to the taxpayer." *Alexander Proudfoot Co. v. United States,* 197 Ct. Cl. at 229, 454 F.2d at 1384. Section 6611(a) states that interest must be allowed and paid on any overpayment in respect of any internal revenue tax at the overpayment rate established under IRC § 6621.

[29] The House Conference Report to the Internal Revenue Service Restructuring and Reform Act of 1998 explains the effect of this interest rate differential:

> If a taxpayer has an underpayment of tax from one year and an overpayment of tax from a different year that are outstanding at the same time, the IRS will typically offset the overpayment against the underpayment and apply the appropriate interest to the resulting net underpayment or overpayment. However, if either the underpayment

(Continued on following page)

Mortgage Ass'n v. United States, 56 Fed. Cl. at 231-232 (discussing the background of the enactment of § 6621(d)). IRC § 6621(d) achieves this result by applying a net interest rate of zero on overlapping underpayments and overpayments of tax. Rev. Rul. 99-43, 1999-47 I.R.B. 579. "In enacting § 6621(d), Congress anticipated that in situations in which interest is both payable and allowable by the same taxpayer for the same period, the Secretary will make all reasonable efforts to offset the liabilities, rather than process them separately using the net interest rate of zero." Rev. Rul. 2000-26, 2000-1 C.B. 1257 (citing H.R. Conf. Rep. No. 105-599, at 256 (1998)).

In this case, plaintiff's interest netting claim serves as an alternative to its interest suspension claim because they provide identical relief; each is the converse of the other. According to the defendant, the

> global interest netting claim contends that interest is allowable on the 1982 overpayment credited to 1983 estimated tax and must be netted against it, thus eliminating the interest charged from March 15, 1983 to August 2, 1985. The interest suspension claim suspends deficiency

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or overpayment has been satisfied, the IRS will not typically offset the two amounts, but rather will assess or credit interest on the full underpayment or overpayment at the underpayment or overpayment rate. This has the effect of assessing the underpayment at the higher underpayment rate and crediting the overpayment at the lower overpayment rate. This results in the taxpayer being assessed a net interest charge, even if the amounts of the overpayment and underpayment are the same.

H.R. Conf. Rep. No. 105-599, at 256 (1998).

> interest on the same credit-elect ($4,606,074) from March 15, 1983 to August 2, 1985.[30]

In the present case, the "interest netting" issue first arose on May 2, 2000, in a letter from plaintiff's counsel to defendant's counsel and Robert C. Markham, stating: "We are writing pursuant to Revenue Procedure 99-43 to request the application of a net interest rate of zero to certain portions of the interest computation in the captioned case." Plaintiff maintains that, when computing the refund of interest due for its 1982 taxable year, overpayments it made during its 1983 and 1984 taxable years, during the period from March 15, 1983 through August 2, 1985, can be offset against an underpayment of 1982 taxes that was outstanding during the same period for the purpose of applying the net interest rate of zero under § 6621(d). Defendant argues that plaintiff's interest netting claim should be dismissed for two reasons.

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[30] It should be noted that, unlike the case of interest suspension, the defendant maintains that the doctrine of substantial variance is not applicable to a global interest netting claim. Revenue Ruling 99-43 explains how to make a claim for interest netting. Generally, requests for the application of the net interest rate of zero in § 6621(d) to interest accruing before October 1, 1998, should be made on Form 843, Claim for Refund and Request for Abatement. In addition, Revenue Ruling 99-43 provides a special procedure:

> No Form 843 is required when a computation of interest using the net interest rate of zero under § 6621(d) for interest accruing before October 1, 1998, is requested by a taxpayer in connection with a return (or returns) of the taxpayer under consideration by any function of the Service. . . . Rather than filing a Form 843, the taxpayer must furnish a letter or written statement with certain requirements, including a statement that the taxpayer is requesting the net interest rate of zero under § 6621(d).

Rev. Rul. 99-43, 1999-47 I.R.B. 580.

First, the defendant argues that plaintiff's interest netting claim does not meet the requirements of § 6621(d). According to the defendant, the threshold requirement for relief under § 6621(d) is overlapping periods when underpayment interest is "payable" and overpayment interest is "allowable" on equivalent underpayments and overpayments.[31] It is undisputed that deficiency interest was payable for the overlapping period, and was, in fact, paid. Therefore, the question in dispute is whether overpayment interest is "allowable" for the overlapping period.

According to the defendant, interest is not allowable on an overpayment credited to a succeeding year's estimated tax, nor on an overpayment refunded within the 45 day period provided by § 6611(e). The plaintiff disagrees, arguing that the defendant "misreads § 6621(d) itself, in order to create an unnecessary restriction on interest netting." Plaintiff appears to make the argument that interest is "allowable" on its overpayments in this case, pursuant to § 6611, but "no interest is actually *allowed,* because of the restrictions imposed by § 6611(d) and (e)." (emphasis in original).

Section 6402(b) states that: "(b) Credits Against Estimated Tax. – The Secretary is authorized to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer or the Secretary to be an overpayment of the income tax for a preceding taxable

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[31] Rev. Ruling 99-43 states that: "This revenue procedure does not apply to: . . . (2) an overpayment or underpayment for any period during which interest on the overpayment or underpayment was not allowable or payable by law (e.g., the 45-day interest disallowance rule under § 6611(e)). . . ." Rev. Rul. 99-43, 1999-47 I.R.B. 580.

year." 26 U.S.C. § 6402(b) (1982). Treasury Regulation § 301.6402-3(a)(5), which implements § 6402(b), provides:

> If the taxpayer indicates on its return (or amended return) that all or part of the overpayment shown by its return (or amended return) is to be applied to its estimated income tax for its succeeding taxable year, such indication shall constitute an election to so apply such overpayment, and no interest shall be allowed on such portion of the overpayment credited and such amount shall be applied as a payment on account of the estimated income tax for such year or the installments thereof.

26 C.F.R. § 301.6402-3(a)(5) (1983 and 1984). Similarly, Treas. Reg. § 301.6611-1(h)(2)(vii) states:

> (vii) *Estimated income tax for succeeding year.* If the taxpayer elects to have all or part of the overpayment shown by his return applied to his estimated tax for his succeeding taxable year, no interest shall be allowed on such portion of the overpayment credited and such amount shall be applied as a payment on account of the estimated tax for such year or the installments thereof.

26 C.F.R. § 301.6611-1(h)(2)(vii) (1983 and 1984).

As the United States Court of Appeals for the Federal Circuit recognized, a distinction must be made between "overpayments" generally, which do incur interest, and "credit elect overpayments," which do not. According to the Federal Circuit:

> It is well established that the taxpayer earns no interest on credit elect overpayments. If a taxpayer elects to credit against its estimated liability for one taxable year an overpayment shown

> on its return for the preceding year, it collects no interest even though at one point it has paid the IRS more than was due.

Marsh & McLennan Cos., Inc. and Subsidiaries v. United States, 302 F.3d 1369, 1373 (Fed. Cir. 2002) (citing 26 C.F.R. § 301.6611-1(h)(2)(vii) (2001) and *Martin Marietta Corp. v. United States,* 216 Ct. Cl. 47, 572 F.2d 839, 841 (1978)), *reh'g denied, reh'g en banc denied* (2002), *cert. denied,* 538 U.S. 925 (2003). Since the "regulations expressly provide that interest shall not be allowed on credit elect overpayments under section 6611(a)," no interest accrued on plaintiff's overpayment reported on its 1982 return, which was credited to its 1983 estimated tax, nor on the overpayment reported on its 1983 return, which was credited to the 1984 estimated tax. *Id.* at 1379 (citing § 301.6611-1(h)(2)(vii)). Therefore, IRC § 6621(d) is not applicable to this case.

In addition, pursuant to § 6611(e), interest is not allowable on the refund of an overpayment made within 45 days of the filing of the return. 26 U.S.C. § 6611(e) (1982). Section 6611(e), as applicable to returns for 1984, states:

> (e) Income tax refund within 45 days after return is filed.
>
> If any overpayment of tax imposed by subtitle A is refunded within 45 days after the last date prescribed for filing the return of such tax (determined without regard to any extension of time for filing the return) or, in case the return is filed after such last date, is refunded within 45 days after the date the return is filed, no interest shall be allowed under subsection (a) on such overpayment.

26 U.S.C. § 6611(e). Plaintiff's return for 1984 was due on March 15, 1985. As a result of an extension, plaintiff filed its return on July 10, 1985, claiming an overpayment, which the IRS refunded on August 2, 1985. On the basis of the plain language of IRC § 6611(e), defendant argues that, since the overpayment for 1984 was in fact refunded within 45 days, no interest is allowable. The court agrees.

The plain language of the relevant statutes, regulations, and case law supports the defendant's position that interest netting is not applicable to this case. Plaintiff does not provide support for a contrary conclusion. Given that interest is not allowable on an overpayment credited to a succeeding year's estimated tax, nor on an overpayment refunded within 45 days, plaintiff does not qualify for relief under IRC § 6621(d). In light of the court's finding that IRC § 6621(d) is not applicable to this case, the court need not address defendant's second argument with respect to interest netting, that the special rule providing retroactive relief pursuant to IRC § 6621(d) is not applicable to the plaintiff in this case. *See* Pub. L. No. 105-206, § 3301(c)(2), 112 Stat. 685, 741 (1998), amended by Pub. L. No. 105-277, § 4002(d), 112 Stat. 2681, 2681-906 (1998). However, the court notes that the United States Court of Appeals for the Federal Circuit's recent decision in *Federal National Mortgage Association v. United States* supports the defendant's interpretation of the special rule. *See Fed. Nat'l. Mortgage Assoc. v. United States,* 2004 U.S. App. LEXIS 16588, at *19 ("Accordingly, to the extent the government is correct that both limitations periods – i.e., for the underpayments and the overpayments – were closed on July 22, 1998, the Court of Federal Claims lacked jurisdiction to entertain FNMA's claim or at least

its 'jurisdiction to grant relief.'"). Plaintiff's interest netting claim is dismissed.

CONCLUSION

The plaintiff's interest suspension claim is barred by the doctrine of substantial variance. As a result, this court does not have jurisdiction over the claim. The principle of interest netting, pursuant to IRC § 6621(d), is not applicable to this case. Therefore, the court **GRANTS** defendant's motion to dismiss plaintiff's claims for "interest netting" and "interest suspension." As conceded by the defendant, the plaintiff is entitled to a refund judgment of deficiency interest for tax year 1982 in the amount of $2,997,761.42. The clerk's office shall enter **JUDGMENT** consistent with this opinion.

IT IS SO ORDERED.

MARIAN BLANK HORN
Judge

2006 WL 2505690

United States Court of Appeals
for the Federal Circuit

05-5014

COMPUTERVISION CORPORATION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

John S. Brown, Bingham McCutchen LLP, of Boston, Massachusetts, filed a petition for rehearing en banc for plaintiff-appellant. With him on the petition were *George P. Mair*, *Donald-Bruce Abrams* and *Matthew D. Schnall*.

Francesca U. Tamami, Attorney, Tax Division, United States Department of Justice, of Washington, DC, filed a response to the petition for defendant-appellee. With her on the response were *Eileen J. O'Connor*, Assistant Attorney General; *Richard T. Morrison*, Deputy Assistant Attorney General; *Gilbert S. Rothenberg* and *Bruce R. Ellisen*, Attorneys.

Appealed from: United States Court of Federal Claims.

Judge Marian Blank Horn.

ON PETITION FOR REHEARING EN BANC

Before MICHEL, *Chief Judge*, NEWMAN, MAYER, LOURIE, RADER, SCHALL, BRYSON, GAJARSA, LINN, DYK, and PROST, *Circuit Judges*.

ORDER

A petition for rehearing en banc was filed by the Appellant, and a response thereto was invited by the court and filed by the Appellee. The petition was referred first as a petition for panel rehearing to the panel that heard the appeal, and thereafter the petition and response were referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for rehearing is denied.[1]

(2) The petition for rehearing en banc is denied.

(3) The mandate of the court will issue on September 6, 2006.

FOR THE COURT

Aug 30 2006
Date

s/ Jan Horbaly
Jan Horbaly
Clerk

cc: John S. Brown, Esq.
Francesca U. Tamami, Esq.

[1] The merits panel issues a supplemental opinion simultaneously with this order.

INTERNAL REVENUE CODE (26 U.S.C.)

SECTION 6511. LIMITATIONS ON CREDIT OR REFUND.

* * *

(b) LIMITATION ON ALLOWANCE OF CREDITS AND REFUNDS.

(1) Filing of claim within prescribed period. – No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

* * *

SECTION 6513. TIME RETURN DEEMED FILED AND TAX CONSIDERED PAID.

* * *

(b) PREPAID INCOME TAX. – For purposes of section 6511 or 6512 –

* * *

(2) Any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under section 6012 for such taxable year (determined without regard to any extension of time for filing such return).

* * *

SECTION 6601. INTEREST ON UNDERPAYMENT, NONPAYMENT, OR EXTENSIONS OF TIME FOR PAYMENT, OF TAX.

(a) GENERAL RULE. – If any amount of tax imposed by this title (whether required to be shown on a return, or

to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at the underpayment rate established under section 6621 shall be paid for the period from such last date to the date paid.

* * *

SECTION 6611. INTEREST ON OVERPAYMENTS.

(a) RATE. – Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.

* * *

(d) Advance Payment of Tax, Payment of Estimated Tax, and Credit for Income Tax Withholding. – The provisions of section 6513 (except the provisions of subsection (c) thereof), applicable in determining the date of payment of tax for purposes of determining the period of limitation on credit or refund, shall be applicable in determining the date of payment for purposes of subsection (a).

* * *

SECTION 6621. DETERMINATION OF RATE OF INTEREST.

* * *

(d) ELIMINATION OF INTEREST ON OVERLAPPING PERIODS OF TAX OVERPAYMENTS AND UNDERPAYMENTS. – To the extent that, for any period, interest is payable under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the same taxpayer of tax imposed by this title, the net rate of

interest under this section on such amounts shall be zero for such period.

* * *

SECTION 7422. CIVIL ACTIONS FOR REFUND.

(a) NO SUIT PRIOR TO FILING CLAIM FOR REFUND. – No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

* * *

TREASURY REGULATIONS (26 C.F.R.)

SECTION 301.6402-2. CLAIMS FOR CREDIT OR REFUND.

* * *

(b) Grounds set forth in claim. (1) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not

be considered for any purpose as a claim for refund or credit.

* * *

SECTION 301.6611-1 INTEREST ON OVERPAYMENTS.

* * *

(h) Period for which interest allowable in case of credits –

* * *

(2) Determination of due date –

* * *

(vii) Estimated income tax for succeeding year. If the taxpayer elects to have all or part of the overpayment shown by his return applied to his estimated tax for his succeeding taxable year, no interest shall be allowed on such portion of the overpayment credited and such amount shall be applied as a payment on account of the estimated tax for such year or the installments thereof.

EXECUTIVE ORDER NO. 6166 (June 10, 1933)

REORGANIZATION OF EXECUTIVE AGENCIES GENERALLY

* * *

§ 5. Claims by or against the United States

The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States, and of defending claims and demands against the Government, and of supervising the work of United States attorneys,

marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.

Nothing in this section shall be construed to affect the function of any agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense.

* * *

INTERNAL REVENUE MANUAL

PART 20 (PENALTY AND INTEREST)

* * *

Section 2.8.9.1: Application of Overpayment (Jul. 31, 2001).

1. When Form 2285 is used to compute overpayment and/or underpayment interest, compute interest using a "running module balance" with current TXMOD or Master File information.

A. Apply all normal interest considerations (*i.e.* Revenue Ruling 99-40) in recomputing the tax module.

B. Apply carryback allowances with the loss year filing date for years after Oct. 4, 1982.

C. When applying carryback recaptures, consider Rev. Rul. 99-40 and within module netting procedures as appropriate. Allow credit interest on general adjustment decreases to the liability date of carryback recaptures.

* * *

IN THE UNITED STATES CLAIMS COURT

COMPUTERVISION CORPORATION, Plaintiff,	)	
v.	)	Docket No. **90-284 T**
UNITED STATES OF AMERICA, Defendant.	)	

COMPLAINT

1. This is an action for the refund of $2,808,888 in interest paid to the Internal Revenue Service. The action arises under I.R.C. (26 U.S.C.) § 7422. This Court has jurisdiction under 28 U.S.C. § 1346(a)(1) and 28 U.S.C. § 1491. All references to the I.R.C. below are to the Internal Revenue Code of 1954 (26 U.S.C.) as amended and in effect during the taxable years at issue.

2. Plaintiff, Computervision Corporation ("Computervision"), is a Delaware corporation with its principal place of business at 100 Crosby Drive, Bedford, Massachusetts 01730. Computervision designs, manufactures, and sells computer-aided design/computer-aided manufacturing ("CAD/CAM") products.

3. The Defendant is the United States of America.

4. On an audit of Computervision's federal income tax returns, the Internal Revenue Service issued an Examination Report dated January 7, 1986, proposing a deficiency of $6,224,982 for Computervision's 1982 taxable year. The proposed deficiency was attributable, in part, to the proposed disqualification of Computervision International

Corp. ("International") as a DISC within the meaning of I.R.C. § 992(a)(1) for its taxable year ending January 31, 1983.

5. During the years at issue, International, a wholly-owned subsidiary of Computervision, acted as commission agent for Computervision's sales that generated qualified export receipts within the meaning of I.R.C. § 993(a), and was paid a commission with respect thereto in an amount properly computed under I.R.C. §§ 994(a)(2) and 994(b).

6. On January 31, 1983, International paid to Computervision the sum of $33,083,438.13. This payment was made in order to: (i) reimburse Computervision for certain expenses incurred by Computervision on International's behalf, (ii) purchase all of the qualified export receivables then held by Computervision, and (iii) distribute the balance as a dividend to Computervision.

7. Declaration of the dividend was confirmed by a consent vote executed by International's directors on or about February 23, 1983, and dated as of January 31, 1983, the date the dividend was paid. The proposed disqualification of International as a DISC was based on the erroneous treatment of the January 31, 1983 transactions described in the preceding paragraph as ineffective until the precise amounts of the dividend, the reimbursement, and the receivables purchase were determined and recorded in the books of account of International and Computervision, with the result that International's payment on January 31, 1983 created a loan or receivable that was not a "qualified export asset" within the meaning of I.R.C. § 993(b). On these grounds, it was erroneously determined that International failed to satisfy the requirements

of I.R.C. § 992(a)(1)(B) for its taxable year ended January 31, 1983.

8. On January 30, 1986, Computervision filed Form 1139, Corporation Application for Tentative Refund, carrying back a 1985 net operating loss ("NOL"). The NOL carryback eliminated the proposed deficiency for Computervision's 1982 taxable year, except for the recapture of certain investment tax credits. The tax of $37,776 attributable to the recapture of investment tax credits has been paid in full.

9. On June 8, 1988, Computervision received a bill from the Internal Revenue Service for interest through June 3, 1988, in the amount of $4,095,974.42 for the 1982 taxable year. After adjustment and correction of this bill, Computervision paid $4,063,073.67 of interest on April 28, 1989, as set forth on Form 2285 attached hereto as *Exhibit A*. Of the total interest paid, $2,808,888 is attributable to the disqualification of International as a DISC for its taxable year ending January 31, 1983.

10. On July 28, 1989, Computervision submitted to the Internal Revenue Service a proper claim for a refund of the portion of the interest that was attributable to the DISC disqualification issue. A true copy of Computervision's claim for refund is attached hereto as *Exhibit B*. Six months have expired since the date such claim for a refund was filed, and Computervision has received no notice of any decision with respect thereto.

11. Computervision is aggrieved by the defendant's failure to refund the interest attributable to the purported disqualification of International as a DISC. As a result of the transactions described in paragraph 6, International, at the close of its taxable year ending January 31, 1983,

did not have non-qualified export assets in excess of the amounts permitted by I.R.C. § 992(a)(1)(B). The disqualification of International as a DISC was therefore erroneous and improper.

WHEREFORE, the plaintiff prays that this Court enter judgment in favor of Computervision in the amount of $2,808,888 or such other amount as may be due, together with interest and costs as provided by law, and for such other and further relief to which the plaintiff may be entitled.

COMPUTERVISION CORPORATION
By its attorney,

/s/ John S. Brown
John S. Brown

BINGHAM, DANA & GOULD
150 Federal Street
Boston, Massachusetts 02110
Telephone: (617) 951-8000

April 3, 1990

Of Counsel:

/s/ Joseph L. Kociubes
Joseph L. Kociubes

/s/ Donald-Bruce Abrams
Donald-Bruce Abrams

BINGHAM, DANA & GOULD
150 Federal Street
Boston, Massachusetts 02110
Telephone: (617) 951-8000

2783D
#66606

EXHIBIT A

Form 2285 (Rev. November 1978)
Department of the Treasury
Internal Revenue Service

Concurrent Determinations of Deficiencies (Increases in Tax) and Overassessments (Decreases in Tax) in Cases Involving Restricted Interest Provisions of the Internal Revenue Code

Name of taxpayer: Computervision Corp + Subs
Address:

11-31-72

Section I - Computation of Increase (Decrease) in Tax

Amounts representing decreases in tax are enclosed in parentheses in Sections I and II

Prepared by (Signature): [illegible]

Date: 3/15/89

Interest Notice Cl No. / Cl No. / Allowed under Code section I.R.C.	General Adjustments (a)	Other (b)	Carryback Losses or Credits From: First Succeeding Taxable Year ____ (c)	Second Succeeding Taxable Year ____ (d)	Third Succeeding Taxable Year 0512 (e)	After All Adjustments (f)
1. Taxable income for income tax purposes	22,117,447 -				26,347,256	22,117,447
2. Net adjustments	4,229,809				(26,347,256)	(22,117,447)
3. Correct taxable income	26,347,256				-0-	-0-
4. Tentative income tax					264,965	
5. Less tax credit carryback					-0-	
6. Income tax	7,283,176				264,965	264,965
7. Previous tax liability	5,066,843 -				7,283,176	5,066,843
8. Increase (decrease) in tax	2,216,333				(7,018,211)	(4,801,878)
9. Tentative allowance	-0-				4,959,394	4,959,394
10. Net increase (decrease) in tax	2,216,333				(2,058,817)	157,516 +

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Section II - Interest Worksheet (Interest on general adjustments tax increase (decrease))

1. Increase in tax to be charged: 37,776.
2. 2,997,109. (Amt Pd.)

	Amount	Factor	From	To	Interest	
3.	2,216,333		03-15-83	03-15-86	936,635	3,316,871.62
4.	Bal on Stat	936,635	03-15-86	04-05-88	199,820	718,070.40
5.	157,516		03-15-83	04-05-88	114,373	28,131.65

6. 3,997,109 (Line 6 is the total of lines 3, 4, and 5) — (A) 1,250,828 — (B) 4,063,073.67
7. 0 Remainder of general adjustments tax increase (decrease). Interest on this and other increases in tax computed below.

8.	(7,848,633)	no interest	03-15-86	03-15-83	-0-
9.					
10.					
11.					
12.					
13.					

Pd 4/25/89

14. 37,776 Increase in tax to be charged — Initials and Date: [illegible] 5/27/88 — Interest to be charged: ~~1,250,828.42~~

Form 2285 (Rev. 11-78)

Form 5312 C Plan... (B) - (A) 2,812,246.

BEST AVAILABLE COPY

EXHIBIT B

Form **843**
(Rev. December 1987)
Department of the Treasury
Internal Revenue Service

Claim

► See instructions on back.

OMB No. 15
Expires 9/3(

If your claim is for an overpayment of income taxes, do NOT use this form. (See instructions.)
(Use this form ONLY if your claim involves one of the taxes shown on line 8 or a refund or abatement of interest or penalties.)

Please type or print

Name of taxpayer or purchaser of stamps: COMPUTERVISION CORPORATION
Telephone number (optional): (508) 655-6000 X58

Number and street: PRIME PARK MS15-43

City, town, or post office, state, and ZIP code: NATICK, MA 01760

Fill in applicable items—Use attachments if necessary

1 Your social security number | 2 Spouse's social security number | 3 Employer identification number: 04-2566004

4 Name and address shown on return if different from above: 201 BURLINGTON RD BEDFORD, MA 01730

5 Period—prepare separate form for each tax period: From JAN 1 ,1982, to DEC 31 ,1982

6 Amount to be refunded or a: $ 2,808,888 (*)

7 Dates of payment: APRIL 28, 1989

8 Type of tax or penalty
☐ Employment ☐ Estate ☐ Excise ☐ Gift ☐ Stamp ☐ Penalty IRC section ► INTEREST

9 Kind of return filed
☐ 706 ☐ 709 ☐ 720 IRS No. (s) ► ..... ☐ 940 ☐ 941 ☐ 990-PF ☐ 2290 ☐ 4
☐ Other (specify) ► 1120

10 If this claim involves refund of excise taxes on gasoline or special fuels, please indicate your tax year for income tax purposes.

11 Explain why you believe this claim should be allowed and show computation of tax refund or abatement of interest or penalty.

SEE ATTACHED.

(*) OR OTHER AMOUNT THAT MAY BE LEGALLY ALLOWABLE

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Director's S: Yr
(Date received)

Signature (Title, if applicable): [illegible] Assistant Treasurer Date: 12/11/89

Signature ..... Date .....

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For Internal Revenue Service Use Only
☐ Refund of taxes illegally, erroneously, or excessively collected
☐ Refund of amount paid for stamps unused, or used in error or excess
☐ Abatement of tax assessed (not applicable to estate or gift taxes)

For Paperwork Reduction Act Notice, see instructions on back.

Form 843 (R

App. 132

Instructions

(Section references are to the Internal Revenue Code.)

Paperwork Reduction Act Notice. We ask for this information to carry out the Internal Revenue laws of the United States. We need it to ensure that taxpayers are complying with these laws and to allow us to figure and collect the right amount of tax. You are required to give us this information.

Purpose of Form. This form can be used to claim certain refunds and abatements. Use Form 843 to file a claim for refund of overpaid taxes (except in the case of income tax), interest, penalties, and additions to tax. For example, if on your employment tax return you reported and paid more Federal income tax (FIT) was actually withheld from an employee, use this form to claim a refund.

Form 843 is also used to file a claim for underpaid or an overassessment, or the unpaid portion of an overassessment, if more than the correct amount of tax (except in the case of income, estate, and gift taxes), interest, additional amount, addition to tax, or assessable penalty has been assessed.

How section 6404(e) gives IRS the authority to abate interest in cases where the additional interest was caused by IRS errors and delays. Section 6404(e) applies only if there was an error or delay in performing a ministerial act (defined below) and only relates to a tax of the type for which a notice of deficiency is required by section 6212(a), which includes the taxes relating to income, generation-skipping, estate, gift, and certain excise taxes imposed by chapter 41, 42, 43, 44, or 45. Section 6404(e) does not authorize the abatement of interest for employment taxes or other excise taxes.

Ministerial Act. The term "ministerial act" means a procedural or mechanical act that does not involve the exercise of judgment or discretion and that occurs during the processing of your case after all prerequisites of the act, such as conferences and review by supervisors, have taken place. Get Publication 556, Examination of Returns, Appeal Rights, and Claims for Refund, for more information.

Special Instructions for Requesting Abatement of Interest Under Section 6404(e). Across the top of Form 843, write "Request for Abatement of Interest under Rev. Proc. 87-42." Fill in your name and address, and complete lines 1 through 4, whichever are applicable.

Line 5 should state the tax period involved.

Skip lines 6, 8, and 9.

Line 7 should show dates of any payment of interest or tax liability with respect to the tax period and type of tax to which the claim relates.

Line 11 should state the type of tax involved, when you were first contacted by the Service in writing with respect to the deficiency or payment, the specific period for which you are requesting abatement of interest, the circumstances of your case, and the reason or reasons why you believe that failure to abate the interest would result in grossly unfair treatment.

A separate Form 843 should be filed for each tax period for each type of tax. However, if the interest assessment resulted from the Service's error or delay in performing a single ministerial act that affected a tax assessment for multiple tax years or types of tax (for example, where 2 or more tax years were under examination), only one Form 843 is required.

Special Instructions for requesting refund, credit, or abatement of interest treated as erroneously paid or assessed as a result of the amendment of section 6601(c). Taxpayers may recover or have abated, interest imposed with respect to the suspension period on interest that accrued before January 1, 1988. A claim for refund or credit must be filed within 3 years from the time the return of tax to which the interest relates was filed or within 2 years from the time the interest was paid, whichever is later.

If you are filing for a refund of suspension period interest, write across the top of Form 843 "Request filed under Rev. Proc. 87-43" and leave lines 5, 6, 8, and 10 blank. Line 7 should show the date the interest was paid if known and state whether the claim is for a credit or refund. Leave line 7 blank if the interest has been assessed but not paid.

The following statement should be included on line 11: "Interest on a deficiency of _____ (enter the type of tax; e.g., income, estate, or gift tax) for the tax period ending _____ was suspended pursuant to section 6601(c) of the Internal Revenue Code. This is a claim for credit, refund, or abatement of the interest collected or assessed for the period the suspension was in effect."

General Instructions. Do not use this form to make a claim for overpayment of income tax. Individuals who filed Form 1040, 1040A, or 1040EZ must use Form 1040X, Amended U.S. Individual Income Tax Return, to claim an overpayment. Corporations who filed Form 1120 or Form 1120-A, must use Form 1120X, Amended U.S. Corporation Income Tax Return, to claim an overpayment. Other income tax filers should file a claim on the appropriate amended tax return. (Follow the instructions on the appropriate form for filing an amended return.)

Your agent may make a claim for you. In this case, the original or a copy of the power of attorney must be attached to the claim.

If you are filing the claim as a legal representative for a decedent whose return you filed, attach to the claim a statement that you filed the return and are still acting as the representative. If you did not file the decedent's return, attach to the claim certified copies of letters testamentary, letters of administration, or similar evidence to show your authority.

If a corporation is making the claim, the person authorized to act in its behalf must sign the claim and show his/her title.

Specific Instructions. Lines that are not explained below are self-explanatory.

Lines 1 and 2. If you are claiming a refund based on an overpayment made on a joint return, such as a refund for overpaid Windfall Profits Tax, each spouse's social security number must be entered.

Line 3. Check the appropriate box to show the type of tax or penalty. If you are filing a claim for refund or abatement of an assessed penalty, check the box and enter the applicable Internal Revenue Code (IRC) section. For example, if the penalty was assessed under section 6700, check the penalty box and enter 6700 in the space provided. Generally, the IRC section can be found on the Notice of Assessment you receive from the Service Center.

Line 9. Check the appropriate box to show the kind of return, if any, that was filed. If the box for Form 720 is checked, enter the IRS No.(s) in the space provided. The IRS No. can be found on Form 720 to the right of the entry space for the tax.

Line 11. Specify in detail your reasons for filing the claim and show your computation for the credit, refund, or abatement. Also attach appropriate supporting evidence.

Signature. If you are claiming a refund based on an overpayment made on a joint return, such as a refund for overpaid windfall profits tax, each spouse must sign the refund claim.

Where To File. File your claim with the Internal Revenue Service Center where you filed your return.

If your claim is for alcohol and tobacco taxes, see the regulations for that particular tax to determine whether you should file with the Regional Director, Bureau of Alcohol, Tobacco and Firearms.

For Internal Revenue Service Use Only

Transcript of Claimant's Account

(Complete only for miscellaneous excise taxes and alcohol, tobacco, and certain other excise taxes imposed under subtitles D and E, Internal Revenue Code.)

The following is a transcript of the record of this office covering the liability that is the subject of this claim.

A—Assessed Taxes

Tax Period and Class of Tax (a)	Document Locator No. (b)	Reference and Date (c)	Amount Assessed (d)	Paid, Abated, or Credited: Date of Subsq. Adj. (e)	Amount (f)	FD, AB, OR (g)	Remarks (h)

B—Purchase of Stamps

To Whom Sold or Issued (i)	Kind (j)	Number (k)	Denomination (l)	Date of Sale (m)	Amount (n)	If Special Tax Stamp, State: Document Locator No. (o)	If Special Tax Stamp, State: Period Commencing (p)

Prepared by (signature) | Date | Title

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BEST AVAILABLE COPY

Computervision Corporation
Prime Park MS 15-43
Natick, MA 01730
(E.I.N. 04-2566004)

Attachment to Form
843 For the Taxable Year
Ending December 31, 1982

A. Background

1. Computervision Corporation ("Computervision"), is a Delaware corporation with its principal place of business at 100 Crosby Drive, Bedford, Massachusetts 01730. Computervision designs, manufactures, and sells Computer-aided Design/ Computer-aided Manufacturing ("CAD/CAM") products, and maintains its books and records on an accrual basis using the calendar year.

2. Computervision International Corp. "(International") was a Massachusetts corporation and a wholly-owned subsidiary of Computervision during Computervision's taxable year ending December 31, 1982 and International's taxable year ending January 31, 1983, and maintained its books and records on an accrual basis using a taxable year ending January 31.

3. During its taxable years ending January 31, 1982 and 1983, as described more fully in paragraph B(1) below, International operated as a Domestic International Sales Corporation ("DISC") within the meaning of Section 992(a)(1) of the Internal Revenue Code (as amended and in effect for the period here involved, the "Code"), and acted as commission agent for Computervision's sales that generated qualified export receipts within the meaning of Section 993(a) of the Code.

4. For its 1982 taxable year, Computervision timely filed with the Office of the Internal Revenue Service at Andover, Massachusetts a consolidated federal income tax return under Section 1502 of the Code with its subsidiaries Computervision Productivity Centre, Ltd., Computervision Australia, Ltd., and Computervision (Europe), Inc.

5. The Internal Revenue Service audited Computervision's tax return for its 1982 taxable year and sent Computervision a copy of an Examination Report dated January 7, 1986. The Examination Report was issued by the District Director of Internal Revenue Service at Boston, Massachusetts and stated that a deficiency of $6,224,982 existed. Among the items set forth in the report was a proposed disqualification of International as a DISC for the taxable years noted above.

6. On January 30, 1986, Computervision filed Form 1139, Corporation Application for Tentative Refund, carrying back a net operating loss ("NOL") that eliminated all of the taxable income of Computervision set forth on its federal income tax returns as originally filed for the years 1982, 1983 and 1984. The only tax liability remaining on the 1982 return was investment tax credit recapture in the amount of $107,449.

7. Computervision submitted a Protest on April 11, 1986 to the District Director of Internal Revenue, Boston, Massachusetts, regarding the position of the Internal Revenue Service for Computervision's 1982 taxable year set forth in the Examination Report as it related to the disqualification of International as a DISC and other issues. Computervision settled all the primary issues with the Appellate Conferee with the exception of the DISC disqualification issue. The tax due with

respect to such settlement, limited to additional investment tax credit recapture of $37,776, has been paid.

8. Regardless of whether or not the DISC is disqualified for the years at issue, Computervision has sufficient NOL's from subsequent years available to be carried back to eliminate entirely the regular tax liability for 1982. As a result, no deficiency notice was issued for the 1982 tax year and Computervision was unable to pursue the disqualification issue before the Tax Court.

9. On April 13, 1988, the Boston Appeals Office notified Computervision that it had closed Computervision's 1982 taxable year and had transmitted the file to the Internal Revenue Service service center for computation of the amount due. On June 8, 1988, Computervision received a bill from the Internal Revenue Service for interest through June 3, 1988 in the amount of $4,095,974.42; after adjustment and correction of this bill, Computervision paid $4,063,073 of interest on April 28, 1989, as set forth on Form 2285 attached hereto.

10. However, since a portion of the $4,063,073 interest paid on April 28, 1989 relates to the DISC disqualification, Computervision is hereby filing a refund claim for that portion of the interest relating to the disqualification issue.

B. *Grounds For Refund*

1. *Primary issue: DISC Disqualification*

Computervision and International were parties to a Commission Agreement, dated as of March 22, 1972 and in full force and effect during the

years at issue, that designated International as "Sales Agent" for Computervision on all sales of export property and provided that International would receive a commission on Computervision's qualified export receipts equal to the maximum amount allowable under Section 994 of the Code.

International's activities were reviewed by an Internal Revenue Service international agent, whose findings were incorporated in the Examination Report. The Examination Report erroneously proposed to disqualify the DISC for its taxable year ending January 31, 1983. On the basis of that erroneous disqualification, the Examination Report proposed the reallocation of the corresponding commission income/expense to Computervision under Section 482 of the Code and the commencement of a deemed distribution of International's accumulated DISC income under Section 995(b)(2) of the Code.

The DISC disqualification was based on a purported failure to satisfy Section 992(a)(1)(8) of the Code. That provision requires the adjusted basis of a DISC's qualified export assets at the close of its taxable year to equal or exceed 95% of the adjusted basis of all of its assets.

This purported failure relates to the characterization of certain actions taken on January 31, 1983 and on February 23, 1983.

On January 31, 1983, loans outstanding from Computervision to International were repaid with accrued interest. On that same date, using the proceeds from the repayment of the loan and interest, International purchased qualified export receivables from Computervision, reimbursed Computervision for certain expenses incurred on

behalf of International, and distributed the balance as a dividend. The specific amounts of these transactions were documented in journal entries in each of the general ledgers of Computervision and International on February 23, 1983. The Examination Report challenged these transactions as untimely, and therefore concluded erroneously that they resulted in the possession of sufficient non-qualified export assets by International as of the close of its taxable year ending Janury [sic] 31, 1983 to fail the Section 992(a)(1)(B) 95% test.

Computervision disagrees with this conclusion and is hereby making this claim for refund for the portion of the interest paid that is attributable to the disqualification of International as a DISC for its fiscal year ending January 31, 1983.

2. *Alternative Issues*

In the alternative to the primary issue described in paragraph B(1) above, the Examination Report erroneously asserted that the commission paid by Computervision to International for Computervision's 1982 taxable year (the "DISC Commission") was greater than that permitted by the statute as the result of the manner in which Computervision (1) allocated the discount arising from the sale of certain accounts receivable to International, and (2) computed International's export promotion expenses. These issues are discussed in subparagraphs (a) and (b) below.

In computing the DISC Commission for its 1982 taxable year, Computervision used the 50% method prescribed by Section 994(a)(2) of the Code, as modified by the marginal costing rules authorized by Section 994(b)(2) and set forth in

Treas. Reg. § 1.994-2. Under this method and pursuant to the Commission Agreement, Computervision was entitled to pay International a commission such that its income would equal 50% of the combined taxable income of Computervision and International attributable to qualified export receipts, plus 10% of International's export promotion expenses.

(a) *Allocation of Discount Expense*

During its 1982 taxable year, Computervision sold certain accounts receivable arising from sales on which International had earned a commission to International at an arms's-length [sic] discount. The discount accrued with respect to sales of receivables during Computervisions's 1982 taxable year was treated by International as interest income, and was treated by Computervision in its 1982 federal income tax return as interest expense, allocated among Computervision's product lines in accordance with Treas. Reg. § 1.861-8.

The Examination Report erroneously subtracted the full amount of the discount from combined taxable income on the basis of a reference to Treas. Reg. § 1.994-1(c)(6)(v), without regard to whether the combined taxable income was computed under the full costing rules of Treas. Reg. § 1.994-1 or under the overall profit percentage limitation in the marginal costing rules set forth in Treas. Reg. § 1.994-2. The Examination Report accordingly proposed a reduction in the DISC Commission by $964,805, or 50% of the difference between the total amount of the discount and the discount allocated by Computervision to

the product lines generating qualified export receipts.

Computervision's method of allocating the discount among these product lines is the correct method. Furthermore, even if discount is to be subtracted directly from combined taxable income pursuant to Treas. Reg. § 1.994-1(c)(6)(v), such a reduction effects only the "combined taxable income" computed for full costing purposes under Treas. Reg. § 1.994-1. As noted above, Computervision computed the combined taxable income of each of its product lines under the marginal costing rules of Treas. Reg. § 1.994-2, which computation was subject to the overall profit percentage limitation of Treas. Reg. § 1.994-2(b)(3).

Under the overall profit percentage limitation, only that fraction of the discount equal to the fraction of total gross receipts represented by the gross receipts from sales on which International earned a commission may be subtracted from marginal costing combined taxable income.

Computervision believes that it has correctly computed the combined taxable income from qualified export receipts in determining the DISC Commission reported on its tax return for 1982. Even if its computation is not correct, however, the reduction in combined taxable income is only a relatively small fraction of that proposed by the Examination Report.

(b) *Export Promotion Expenses*

Computervision and International were parties to an "Agreement Designating Foreign Marketing Departments and Related Intercompany

Accounts," dated as of February 1, 1980 and in full force and effect during the years at issue, that (i) designated certain departments involved in the marketing of products for export sale (the "Foreign Marketing Departments") to be treated as part of International, and (ii) designated the employees of those departments as employees of International. Pursuant to this agreement, the expenses incurred by International were disbursed by Computervision, billed to International at the end of each of International's fiscal years, and paid by International within sixty days of billing.

In 1982 the Foreign Marketing Departments incurred a total of $2,030,897 of expenses meeting the criteria of Treas. Reg. § 1.994-1(f)(2) (describing types of expenses that, if incurred by a DISC, may qualify as export promotion expenses). These expenses were incurred or treated as incurred by International pursuant to the agreement, and accordingly were export promotion expenses for purposes of calculating the DISC Commission. International also incurred a sales commission expense of $539,734 during that period that was unrelated to the Foreign Marketing Departments.

The Examination Report, however, improperly disregarded the plain language of the agreement and unilaterally reallocated all of the expenses incurred by the Foreign Marketing Departments to Computervision. Accordingly, the Examination Report proposed a decrease in International's export promotion expenses of $2,030,897, resulting in a decrease of 10% of this amount, or $203,090, in the deduction allowable to Computervision as a component of the DISC Commission.

Computervision properly computed International's export promotion expenses in reporting the DISC Commission payable to International for Computervision's 1982 taxable year.

3. *General*

Computervision claims as a basis for the refund of the interest paid with respect to its 1982 taxable year such other grounds as are shown to be appropriate by the tax returns, books and records and the Examination Report and related Protest of Computervision and International for their respective tax years ended December 31, 1982 and January 31, 1983.

#66606

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 90-284 T

(Judge Marian Blank Horn)

COMPUTERVISION CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

STIPULATION OF FACTS

(Filed APR 30 2002)

On April 10, 2002, the Court ordered that the parties file a stipulation as to undisputed matters of fact for purposes of a motion, which is to be filed by the Defendant on or before April 30, 2002. Pursuant to the Court's order, and solely for purposes of the Defendant's motion, the parties hereby stipulate and agree as follows:

1. Factual Background

1. Plaintiff, Computervision Corporation ("Computervision"), is a Delaware corporation and during its taxable years ending December 31, 1982, through December 31, 1987, and February 5, 1988 (respectively, the "1982" through "1988" years), was engaged in the design, manufacture and sale of computer-aided design and computer-aided manufacturing products.

2. On or about September 14, 1983, Computervision filed a federal income tax return for the 1982 year reporting tax payments of $9,817,074 (including estimated payments and a credit of an overpayment for Computervision's 1981 tax year), a tax liability of $5,066,843, and a resulting overpayment of $4,750,231. Computervision elected to credit the overpayment to its tax liability for the 1983 year.[1]

3. On September 17, 1984, Computervision filed a federal income tax return for the 1983 year reporting tax payments of $7,606,074 (including estimated payments and the credit of the overpayment for the 1982 year), a tax liability of $276,798, and a resulting overpayment of $7,329,276. The reported payments of $7,606,074 consisted of payments totaling $11,606,074, net of a refund of $4,000,000 previously requested on Form 4466. Computervision elected to credit the overpayment to its tax liability for the 1984 year.

4. On July 2, 1985, Computervision filed a federal income tax return for the 1984 year reporting tax payments of $20,314,261 (including estimated payments and the credit of the overpayment for the 1983 year), a tax liability of $13,148,230, and a resulting overpayment of $7,166,031. Computervision requested a refund of the overpayment. On August 2, 1985, the Internal Revenue Service (the "IRS") paid Computervision a refund of $7,166,031.02, without interest.

5. Computervision executed four Forms 872, Consent to Extend the Time to Assess Tax, which extended the period of limitations for assessments for the 1982

---

[1] According to the transcript for the 1982 year that is attached as an enclosure to *Exhibit 13*, below, the amount actually credited to Computervision's tax liability for the 1983 year was $4,606,074.44.

year to December 31, 1986; June 30, 1987; December 31, 1987; and June 30, 1988.

6. Following an audit of Computervision's 1982 tax return, the IRS issued an Examination Report dated January 7, 1986, proposing a deficiency of $6,224,982 for the 1982 year. A true copy of the Examination Report is attached as *Exhibit 1.* The proposed deficiency was attributable, in part to the proposed disqualification of Computervision's subsidiary, Computervision International Corp. ("CVI"), as a domestic international sales corporation ("DISC") within the meaning of Section 992(a)(1) of the Internal Revenue Code of 1954, as amended, for CVI's taxable year ending January 31, 1983.

7. On January 30, 1986, Computervision filed a tentative refund claim on Form 1139, carrying back a net operating loss from Computervision's 1985 year to the 1982 year.

8. Following a proceeding before the Boston Appeals Office of the IRS, during which Computervision and the IRS settled all the issues included in the 1982 examination report with the exception of those relating to the DISC, the IRS revised the proposed income tax deficiency for Computervision's 1982 year, prior to taking into account the 1985 NOL carryback, to $7,886,409.

9. The 1985 NOL carryback tentatively eliminated the proposed income tax deficiency of $7,886,409 for the 1982 year, except for a deficiency of $37,776 attributable to investment tax credit recapture. The carryback did not eliminate Computervision's liability for the interest accruing on any deficiency for 1982 from March 15, 1983 (the statutory due date of the 1982 return) to March 15, 1986 (the statutory due date of the 1985 return), plus interest on such interest for the

period after March 15, 1986. On April 5, 1988, the IRS received a Form 870 signed by Computervision waiving the restrictions on assessment of the $37,776 tax deficiency attributable to investment tax credit recapture.

10. On June 3, 1988, the IRS assessed tax in the amount of $37,776 for the 1982 year, together with deficiency interest in the amount of $4,095,974.42. The deficiency interest was computed based on the full amount of the proposed deficiency in tax of $7,886,409 (to the date of the elimination of that proposed deficiency by the 1985 NOL carryback). A true copy of the IRS computation is attached to Computervision's Original Refund Claim, which is identified in paragraph 13, below, as *Exhibit 3*.

11. On June 8, 1988, Computervision received a bill from the IRS for interest through June 3, 1988, in the amount of $4,095,974.42. Computervision paid $4,045,011.64 of the assessment on April 28, 1989; the balance of the assessment was satisfied by other payments made by Computervision on August 27, 1987, March 7, 1989, and March 10, 1989.

12. On October 28, 1988, after an audit of Computervision's taxable years ending December 31, 1983, 1984 and 1987, and February 5, 1988 (respectively, the "1983, 1984, 1987 and 1988 years"), the IRS issued an Examination Report proposing deficiencies for those years, as well as for CVI's taxable year ended January 31, 1984. A true copy of the Examination Report (including certain corrections thereto made by the IRS in January, 1989) is attached as *Exhibit 2*. (A copy of *Exhibit 2* was sent to the Department of Justice by Plaintiff's counsel by U.S. Express Mail on April 24, 2002.) The proposed deficiency for CVI, and a portion of the proposed deficiencies for Computervision's 1983 and 1984 years (computed without regard to net

operating loss carrybacks), were attributable to the proposed disqualification of CVI as a DISC for its taxable years ended January 31, 1983 and 1984.

2. Procedural History

13. Computervision filed a claim for refund (the "Original Refund Claim") with the IRS Service Center at Andover, Massachusetts on August 4, 1989. As stated earlier, a true copy of the Original Refund Claim is attached as *Exhibit 3*.

14. As of April 4, 1990, the IRS had not acted on the Original Refund Claim

15. On April 4, 1990, Computervision filed its complaint in this matter. Attached as *Exhibit B* to the Complaint were the first nine pages of the Original Refund Claim.

16. On June 23, 1993, the Joint Committee on Taxation approved the tentative NOL carryback from 1985 to 1982, thus verifying that Computervision had no additional liability in tax for the year. Accordingly, during 1993 and 1994, the parties to this action engaged in discovery.

17. On August 31, 1993, the IRS mailed a notice of deficiency to Computervision for tax years 1983, 1984, 1987, and 1988, and a notice of deficiency to CVI for the tax year ending January 31, 1984. On November 4, 1993, Computervision filed a petition with the United States Tax Court contesting the deficiencies determined for 1983, 1984, 1987, and 1988 (*Computervision Corp. and Subsidiaries v. Commissioner,* Docket No, 25135-93); and CVI filed a petition with the Tax Court contesting the deficiency determination for the tax year ending January 31, 1984 (*Computervision International Corp. v. Commissioner,* Docket No. 25134-93).

18. On March 16, 1995, the Court ordered that this matter be held in suspense pending the decision in the Tax Court.

19. On March 18, 1996, the Tax Court issued an opinion ruling in Computervision's and CVI's favor on the DISC issue. A true copy of the Tax Court opinion is attached as *Exhibit 4*. On February 23, 1998, the Tax Court entered decisions as to Computervision's tax liability for the 1983, 1984, 1987 and 1988 years, and as to CVI's tax liability for its taxable year ending January 31, 1984. True copies of the Tax Court decisions are attached as *Exhibit 5*.

20. The Commissioner of Internal Revenue (the "Commissioner") did not appeal the Tax Court decision with respect to CVI, and that decision became final on May 25, 1998.

21. The Commissioner appealed the Tax Court decision with respect to Computervision on other grounds and Computervision conceded the issues involved in the appeal. A true copy of the Pre-Argument Statement filed by counsel for the Commissioner and dated June 11, 1998, is attached as *Exhibit 6*. On January 7, 1999, the United States Court of Appeals for the First Circuit vacated that decision and remanded the case to the Tax Court for a recalculation of Computervision's tax liability. A true copy of the opinion of the Court of Appeals is attached as *Exhibit 7*. The matter is still before the Tax Court, pending the entry of a decision pursuant to Rule 155 of that court's Rules of Practice and Procedure.

22. Based on the decisions of the Tax Court and the Court of Appeals, the parties are in agreement as to Plaintiffs liability for tax for 1982 and for the 1983, 1984, 1987 and 1988 years at issue before the Tax Court.

23. The parties are not in agreement as to the amount of interest properly refundable to Plaintiff from Defendant for the 1982 year at issue in this proceeding, and the amount of interest properly due from Plaintiff to Defendant for the 1983, 1984, 1987 and 1988 years at issue before the Tax Court.

24. Between January 7, 1999, and October 25, 2000, Plaintiff and the Department of Justice, and Plaintiff and the IRS, exchanged extensive correspondence relating to the computation of the interest due and refundable. True copies of certain items of that correspondence, including the attachments and enclosures thereto, are attached as follows:

Exhibit 8 Letter from John S. Brown and Donald-Bruce Abrams to Ellen C. Specker, dated July 26, 1999

Exhibit 9 Letter from Ellen C. Specker to Donald-Bruce Abrams, dated August 26, 1999

Exhibit 10 Letter from John S. Brown to Ellen C. Specker, dated September 7, 1999

Exhibit 11 Letter from Charles W. Maurer, Jr. to John S. Brown, dated October 15, 1999 (A copy of *Exhibit 11* was sent to the Department of Justice by Plaintiff's counsel by U.S. Express Mail on April 24, 2002.)

Exhibit 12 Letter from Milan D. Karlan to John S. Brown, dated December 28, 1999

Exhibit 13 Letter from Milan D. Karlan to John S. Brown, dated January 13, 2000

Exhibit 14 Letter from Charles W. Maurer, Jr. to John S. Brown, dated March 24, 2000 (A copy of *Exhibit 14* was sent to the Department of

Justice by Plaintiff's counsel by U.S. Express Mail on April 24, 2002.)

Exhibit 15 Letter from Milan D. Karlan to John S. Brown, dated April 24, 2000

Exhibit 16 Letter from John S. Brown to Charles W. Maurer, Jr., dated May 2, 2000 (A copy of *Exhibit 16* was sent to the Department of Justice by Plaintiff's counsel by facsimile on April 3, 2002; a true copy of that facsimile is attached as *Exhibit 17*.)

Exhibit 18 Letter from John S. Brown to Ellen C. Specker and Robert C. Markham, dated May 2, 2000

Exhibit 19 Letter from Charles W. Maurer, Jr. to John S. Brown, dated August 17, 2000

Exhibit 20 Letter from Charles W. Maurer, Jr. to Robert C. Markham, dated September 12, 2000

Exhibit 21 Letter from John S. Brown to Charles W. Maurer, Jr., dated September 21, 2000

25. On October 25, 2000, counsel for Defendant wrote to counsel for Plaintiff objecting to the application of "interest-suspension" principles in the IRS interest computations included in *Exhibit 19* on the ground that the application of such principles had not been specifically requested in the Original Refund Claim. After certain further correspondence, Defendant's counsel reiterated that objection in a letter dated March 14, 2002. True copies of the October 25, 2000, and March 14, 2002 letters are attached, respectively, as *Exhibits 22* and *23*.

26. As of April 4, 2002, the IRS had not acted on the Original Refund Claim.

27. On April 4, 2002, Plaintiff filed an amended claim for refund (the "Amended Refund Claim") specifically requesting the application of interest-suspension principles, and the application of interest-netting principles, in the computation of its refund. A true copy of the Amended Refund Claim is attached as *Exhibit 24*.

28. A true copy of the IRS transcript of account for the 1982 year is included as an attachment to *Exhibit 13*. True copies of the IRS transcripts of account for the 1983 and 1984 years are included with the computations attached to *Exhibit 19*.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

So agreed,

04-29-02
Date

/s/ John S. Brown
JOHN S. BROWN, Attorney
of Record
George P. Mair
Donald-Bruce Abrams
Matthew D. Schnall, Of Counsel
Bingham Dana LLP
150 Federal Street
Boston, Massachusetts 02110
(617) 951-8000

Attorneys for Plaintiff

4/30/02
Date

/s/ Ellen C. Specker
ELLEN C. SPECKER
Attorney of Record
U.S. Department of Justice
Tax Division
Court of Federal Claims Section
Post Office Box 26
Ben Franklin Post Office
Washington, D.C. 20044
(202) 307-0508

EILEEN J. O'CONNOR
Assistant Attorney General
MILDRED L. SEIDMAN
Chief, Court of Federal
Claims Section

4/30/02
Date

/s/ Mildred L. Seidman
Of Counsel

Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that service of the foregoing Stipulation of Facts has, this 30th day of April, 2002, been made on plaintiff by mailing a copy thereof, in a postage prepaid envelope, to the following address:

John S. Brown, Esquire
Bingham Dana LLP
150 Federal Street
Boston, MA 02110-1726

/s/ Diana L. Henderson
U.S. Department of Justice
Tax Division
Court of Federal Claims Section
Post Office Box 26
Ben Franklin Post Office
Washington, D.C. 20044
(202) 307-6440

BINGHAM DANA
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BOSTON, NEW YORK, WASHINGTON,
LOS ANGELES, HARTFORD, LONDON
AND SINGAPORE

John S. Brown
Direct Dial Number
(617) 951-8252

May 2, 2000

BY HAND

Charles W. Maurer, Jr., Esq.
Internal Revenue Service
District Counsel – New England District
10 Causeway Street, Room 401
Boston, Massachusetts 02222-1061

Re: *Computervision Corporation v. Commissioner,*
U.S. Tax Court, Docket No. 25135-93

Dear Mr. Maurer:

We are writing pursuant to Revenue Procedure 99-43 to request the application of a net interest rate of zero to the restricted interest liability expected to result from the judgment of the Tax Court in the captioned ease. Rev. Proc. 99-43, Section 5.06, 1999-47 I.R.B. 579. Following is the information required by Section 5.06 of Rev. Proc. 99-43:

- The computation of the deficiency interest owed by Computervision in respect of its calendar year 1983 and 1984 income tax liabilities at issue in this case is affected by an overpayment of tax

and interest made by Computervision in respect of its income tax liability for calendar year 1982.

- The overpayment was made on April 28, 1989.
- The 1982 period has not previously been applied to obtain a net interest rate of zero under Section 6621(d).

The Department of Justice has recently sent us computations indicating that the overpayment for the 1982 year, as of April 28, 1989, totaled $2,876,828.89, which exceeds Computervision's liability for the 1983 and 1984 periods as of that date. As a result, no interest should accrue for the 1983 and 1984 periods after April 28, 1989.

In addition, the computation of the interest owed by Computervision for the 1983 period is affected by an overpayment made for the 1984 year. As indicated on the schedules that you forwarded to us on March 24, 2000, Computervision's account for tax year 1984 had a credit balance of $6,727,587.02 outstanding from March 15, 1985 through August 2, 1985. Accordingly, the deficiency of $3,683,559.58 shown in Computervision's account for 1983 should have begun accruing interest only after August 2, 1985, and not on March 15, 1985, as indicated on the computations you provided. This portion of the credit balance for 1984 has not previously been applied to obtain a net interest rate of zero under Section 6621(d).

Please call us with any questions regarding these requests for interest netting.

With kind regards.

Sincerely yours,

/s/ John Brown
John S. Brown

cc: Donald-Bruce Abrams, Esq.
Matthew D. Schnall. Esq.

BINGHAM DANA
LLP

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BOSTON, NEW YORK, WASHINGTON,
LOS ANGELES, HARTFORD, LONDON
AND SINGAPORE

John S. Brown
Direct Dial Number
(617) 951-8252

May 2, 2000

BY EXPRESS MAIL

Ellen C. Specker, Esq.
United States Department of Justice
Tax Division, Court of Federal Claims Section
555 Fourth Street, N.W., Room 8108
Washington, D.C. 20001

Robert C. Markham, Esq.
United States Department of Justice
Tax Division, Office of Review
Post Office Box 310
Ben Franklin Station
Washington, D.C. 20044

Re: *Computervision Corporation v. United States,*
U.S. Court of Federal Claims, Docket No. 90-284 T

Dear Ms. Specker and Mr. Markham:

We are writing pursuant to Revenue Procedure 99-43 to request the application of a net interest rate of zero to certain portions of the interest computation in the captioned case. Rev. Proc. 99-43, Section 5.06, 1999-47 I.R.B.

579. Following is the information required by Section 5.06 of Rev. Proc. 99-43:

- The computation of the deficiency interest owed by Computervision in respect of its calendar year 1982 income tax liability at issue in this case is affected by certain overpayments of tax and interest made by Computervision in respect of its income tax liabilities for calendar years 1983 and 1984.

- The dates of the overpayments affecting the 1982 interest computation are as follows:

Period	Amount of Overpayment	Date Overpayment Was Made	Date Overpayment Was Eliminated
1983	$3,106,563.44	March 15, 1984	March 15, 1985
1984	$6,727,587.02	March 15, 1985	August 2, 1985

- The 1983 period has not previously been applied to obtain a net interest rate of zero under Section 6621(d). A portion of the 1984 overpayment shown above ($3,683,559.58) is being applied to obtain a net interest rate of zero in respect of an underpayment for the 1983 period, leaving $3,044,027.44 of the overpayment available to offset the underpayment for 1982.

Based on the computations you provided to us with your letter of April 24, 2000, Computervision's liability for the 1982 period, as of March 15, 1984, totaled $2,339,257.17. As a result of the application of Rev. Proc. 99-43 and Section 6621(d), we believe that no interest should accrue on that amount from March 15, 1984 through August 2, 1985, and that interest should begin accruing only after August 2, 1985. This will reduce the amount of the interest

liability existing at April 28, 1989, and therefore will increase the amount of the overpayment that results from the payment made by Computervision on that date.

Please call us with any questions regarding the request for interest netting.

With kind regards.

Sincerely yours,

/s/ John Brown
John S. Brown

cc: Donald-Bruce Abrams, Esq.
Matthew D. Schnall, Esq.

OFFICE OF CHIEF COUNSEL
INTERNAL REVENUE SERVICE
DISTRICT COUNSEL
New England District
10 Causeway Street
Room 401
Boston, MA 02222-1061
TEL 617-565-7838
FAX 617-565-7894

CC:NER:NED:BOS:TL-25134-93
CWMaurer

AUG 17 2000

John S. Brown
Bingham Dana LLP
150 Federal Street
Boston, MA 02110

In re: Computervision Corporation v. Commissioner,
Docket Number 25135-93

Dear Mr. Brown:

This refers to your letter of May 2, 2000, regarding interest netting, and to the Order of the Court dated June 15, 2000, directing the parties to file a status report on or before August 21, 2000.

We enclose a copy of interest computations prepared by the Appeals Audit Staff. Please review these computations and advise us of any adjustments you believe may be appropriate.

We also enclose an original and two copies of a Joint Status Report. Please sign the original and one copy and

return them to this office as soon as possible for filing with the Court. The second copy is for your files.

Sincerely,

/s/ Charles Maurer
CHARLES W. MAURER, JR.
Attorney

Enclosures: Interest computations dated August 1, 2000
Status report

Internal Revenue Service
MEMORANDUM

date: 08/01/[illegible]

to: Charles W. Maurer,
Attorney

from: Elizabeth Marchand,
Restricted Interest Examiner
New England Appeals (617) 565-7900 ext. 144

---

subject: Computervision 1982, 1983, 1984

Attached are interest computations projected through 08/15/2000.

These computations show the effect of offsetting the overpayment in 1982 to 1983 and 1984.

1982

Revenue ruling 99-40 (Sequa) is applied regarding the credit elect to 1983. No claim is necessary.
$62,279.55 is applied to the first quarter of 1983, 04/15/83.
$4,543,794.89 is applied as of the due date of the 1983 return, 03/15/84

1982 becomes overpaid by	$3,226,684.18	on 04/28/89. Of
this:	$ 638,507.38	is offset to 1983
and	$ 430,864.32	is offset to 1984

Since offsetting has the result of eliminating any overlapping period of debit and credit interest that would have occured [sic], the Net Rate Interest Netting rules do not apply under Rev.Rul. 99-43 and the claim would be disallowed. (Offsetting the payments would occur regardless of whether or not a claim was filed.)

1983

Revenue ruling 99-40 (Sequa) is applied regarding the credit elect to 1984. No claim is necessary.

$7,314,261.02 is applied as of the due date of the 1984 return, 03/15/85

If you have any questions please call me at (617) 565-7900

Date of Computation: 08/01/2000

INTEREST AND PENALTY DETAIL REPORT — TaxInterest Version W2000.3
Taxpayer name...: Computervision 1982 — 08-01-00
Taxpayer ID#....: 04-2566004 — Page 1
Treat as C Corp.: Yes

Events	Date	Amount	Event Date Balance (1)
Gen. Adj.	03-15-83	2,102,421.00	
Tax	03-15-83	5,066,843.00	
Payment	03-15-83	<4,017,074.03>	
Payment	03-15-83	<1,600,000.00>	
Payment	03-15-83	<4,200,000.00>	
Suspend interest	03-15-83		<2,647,810.03>
credit ele(-High Rate 62,279.55)	04-15-83	62,279.55	
Payment	04-15-83	<1,500,000.00>	<4,085,530.48>
IRS Check (-High Rate 75,776.81)	10-24-83	75,776.81	
offset to 941 8306	10-24-83	1,644,156.39	<2,365,597.28>
Resume interest	03-15-84		
credit elect	03-15-84	4,543,794.89	2,178,197.61
offset to 941 8412	03-04-86	35,785.15	
Suspend interest	03-04-86		
NOL c/b fr 8512	03-04-86	<4,959,394.00>	<2,196,888.60>
Resume interest	03-06-86		
IRS Check (-High Rate 4,923,608.85)	03-06-86	4,923,608.85	2,726,720.25
NOl c/b 85	03-15-86	<2,064,645.00>	668,806.04
Payment	08-27-87	<10,560.01>	753,841.88
Payment	03-07-89	<37,776.00>	845,501.59
Payment	03-10-89	<50,000.00>	796,266.25
*FTP 052289	04-28-89	1,905.12	
OFFSET TO 1984	04-28-89	430,864.32	
OFFSET TO 1983	04-28-89	638,507.38	
offset to 941 8812	04-28-89	7,692.11	
Payment	04-28-89	<4,045,011.64>	<2,157,312.48>
Interest Computation Date	08-15-00		<4,824,516.24>

(1) Balance includes any interest and penalties accrued as of the Event Date

Interest Detail

Event	Date	Rate	Base	Interest	Balance
Gen. Adj.	03-15-83		2,102,421.00		2,102,421.00
Tax	03-15-83		5,066,843.00		7,169,264.00
Payment	03-15-83		<4,017,074.03>		3,152,189.97
Payment	03-15-83		<1,600,000.00>		1,552,189.97
Payment	03-15-83		<4,200,000.00>		<2,647,810.03>
Stop Int	03-15-83				
Interest	04-15-83	16.00	<2,647,810.03>		<2,647,810.03>
credit elect	04-15-83		62,279.55		<2,585,530.48>
Payment	04-15-83		<1,500,000.00>		<4,085,530.48>
Interest	06-30-83	16.00	<4,085,530.48>		<4,085,530.48>
Interest	10-24-83	11.00	<4,085,530.48>		<4,085,530.48>
IRS Check	10-24-83		75,776.81		<4,009,753.67>
offset to 941 8306	10-24-83		1,644,156.39		<2,365,597.28>
Interest	12-31-83	11.00	<2,365,597.28>		<2,365,597.28>
Interest	03-15-84	11.00	<2,365,597.28>		<2,365,597.28>
Start Int	03-15-84				
credit elect	03-15-84		4,543,794.89		2,178,197.61
Interest	06-30-84	11.00	2,178,197.61	71,175.12	2,249,372.73
Interest	12-31-84	11.00	2,249,372.73	127,875.54	2,377,248.27

Prepared using TaxInterest for Windows

Date of Computation: 08/01/2000

INTEREST AND PENALTY DETAIL REPORT — TaxInterest Version W2000.3
Taxpayer name...: Computervision 1982 — 08-01-00
Taxpayer ID#....: 04-2566004 — Page 2
Treat as C Corp.: Yes
Interest Detail

Event	Date	Rate	Base	Interest	Balance
Interest	06-30-85	13.00	2,377,248.27	158,269.60	2,535,517.87
Interest	12-31-85	11.00	2,535,517.87	144,548.62	2,680,066.49
Interest	03-04-86	10.00	2,680,066.49	46,653.76	2,726,720.25
offset to 941 8412	03-04-86		35,785.15		2,762,505.40
Stop Int	03-04-86				
NOL c/b fr 8512	03-04-86		<4,959,394.00>		<2,196,888.60>
Interest	03-06-86	10.00	<2,196,888.60>		<2,196,888.60>
Start Int	03-06-86				
IRS Check	03-06-86		4,923,608.85		2,726,720.25
Interest	03-15-86	10.00	2,726,720.25	6,730.79	2,733,451.04
NOL c/b 85	03-15-86		<2,064,645.00>		668,806.04
Interest	06-30-86	10.00	668,806.04	19,893.54	688,699.58
Interest	12-31-86	9.00	688,699.58	31,961.84	720,661.42
Interest	03-31-87	9.00	720,661.42	16,169.52	736,830.94
Interest	06-30-87	9.00	736,830.94	16,718.08	753,549.02
Interest	08-27-87	9.00	753,549.02	10,852.87	764,401.89
Payment	08-27-87		<10,560.01>		753,841.88
Interest	09-30-87	9.00	753,841.88	6,345.66	760,187.54
Interest	12-31-87	10.00	760,187.54	19,401.72	779,589.26
Interest	03-31-88	11.00	779,589.26	21,612.51	801,201.77
Interest	06-30-88	10.00	801,201.77	20,167.51	821,369.28
Interest	09-30-88	10.00	821,369.28	20,905.23	842,274.51
Interest	12-31-88	11.00	842,274.51	23,610.49	865,885.00
Interest	03-07-89	11.00	865,885.00	17,392.59	883,277.59
Payment	03-07-89		<37,776.00>		845,501.59
Interest	03-10-89	11.00	845,501.59	764.66	846,266.25
Payment	03-10-89		<50,000.00>		796,266.25
Interest	03-31-89	11.00	796,266.25	5,054.60	801,320.85
Interest	04-28-89	12.00	801,320.85	7,409.38	808,730.23
OFFSET TO 1984	04-28-89		430,864.32		1,239,594.55
OFFSET TO 1983	04-28-89		638,507.38		1,878,101.93
offset to 941 8812	04-28-89		7,692.11		1,885,794.04
Payment	04-28-89		<4,043,106.52>		<2,157,312.48>
Interest	06-30-89	11.00	<2,157,312.48>	<41,344.40>	<2,198,656.88>
Interest	09-30-89	11.00	<2,198,656.88>	<61,803.53>	<2,260,460.41>
Interest	12-31-89	10.00	<2,260,460.41>	<57,692.11>	<2,318,152.52>
Interest	03-31-90	10.00	<2,318,152.52>	<57,862.44>	<2,376,014.96>
Interest	06-30-90	10.00	<2,376,014.96>	<59,973.93>	<2,435,988.89>
Interest	09-30-90	10.00	<2,435,988.89>	<62,172.00>	<2,498,160.89>
Interest	12-31-90	10.00	<2,498,160.89>	<63,758.77>	<2,561,919.66>
Interest	03-31-91	10.00	<2,561,919.66>	<63,947.01>	<2,625,866.67>
Interest	06-30-91	9.00	<2,625,866.67>	<59,578.71>	<2,685,445.38>
Interest	09-30-91	9.00	<2,685,445.38>	<61,607.69>	<2,747,053.07>
Interest	12-31-91	9.00	<2,747,053.07>	<63,021.05>	<2,810,074.12>
Interest	03-31-92	8.00	<2,810,074.12>	<56,447.73>	<2,866,521.85>
Interest	06-30-92	7.00	<2,866,521.85>	<50,321.84>	<2,916,843.69>
Interest	09-30-92	7.00	<2,916,843.69>	<51,772.90>	<2,968,616.59>
Interest	12-31-92	6.00	<2,968,616.59>	<45,108.19>	<3,013,724.78>
Interest	03-31-93	6.00	<3,013,724.78>	<44,914.35>	<3,058,639.13>
Interest	06-30-93	6.00	<3,058,639.13>	<46,094.00>	<3,104,733.13>
Interest	09-30-93	6.00	<3,104,733.13>	<47,306.70>	<3,152,039.83>
Interest	12-31-93	6.00	<3,152,039.83>	<48,027.51>	<3,200,067.34>
Interest	03-31-94	6.00	<3,200,067.34>	<47,691.46>	<3,247,758.80>
Interest	06-30-94	6.00	<3,247,758.80>	<48,944.05>	<3,296,702.85>

Prepared using TaxInterest for Windows

App. 165

D te of Computation: 08/01/2000

I TEREST AND PENALTY DETAIL REPORT — TaxInterest Version W2000.3
T xpayer name...: Computervision 1982 — 08-01-00
T xpayer ID#....: 04-2566004 — Page 3
T at as C Corp.: Yes
I terest Detail

E ent	Date	Rate	Base	Interest	Balance
I terest	09-30-94	7.00	<3,296,702.85>	<58,676.98>	<3,355,379.83>
I terest	12-31-94	8.00	<3,355,379.83>	<68,338.36>	<3,423,718.19>
G .T Starts 12-31-94		Refund on start date.:	<3,423,718.19>		
G .T Rate	03-31-95	6.50	<3,423,718.19>	<55,310.42>	<3,479,028.61>
G .TT Rate	06-30-95	7.50	<3,479,028.61>	<65,658.27>	<3,544,686.88>
G TT Rate	09-30-95	6.50	<3,544,686.88>	<58,547.68>	<3,603,234.56>
G .TT Rate	12-31-95	6.50	<3,603,234.56>	<59,514.72>	<3,662,749.28>
GATT Rate	03-31-96	6.50	<3,662,749.28>	<59,670.00>	<3,722,419.28>
G TT Rate	06-30-96	5.50	<3,722,419.28>	<51,249.34>	<3,773,668.62>
GATT Rate	09-30-96	6.50	<3,773,668.62>	<62,158.10>	<3,835,826.72>
G .T Rate	12-31-96	6.50	<3,835,826.72>	<63,181.94>	<3,899,008.66>
G .T Rate	03-31-97	6.50	<3,899,008.66>	<62,988.78>	<3,961,997.44>
G .T Rate	06-30-97	6.50	<3,961,997.44>	<64,723.33>	<4,026,720.77>
G .T Rate	09-30-97	6.50	<4,026,720.77>	<66,509.45>	<4,093,230.22>
G .T Rate	12-31-97	6.50	<4,093,230.22>	<67,607.99>	<4,160,838.21>
GATT Rate	03-31-98	6.50	<4,160,838.21>	<67,218.65>	<4,228,056.86>
GATT Rate	06-30-98	5.50	<4,228,056.86>	<58,371.40>	<4,286,428.26>
G .T Rate	09-30-98	5.50	<4,286,428.26>	<59,832.07>	<4,346,260.33>
G .T Rate	12-31-98	5.50	<4,346,260.33>	<60,667.24>	<4,406,927.57>
G .T Rate	03-31-99	4.50	<4,406,927.57>	<49,168.03>	<4,456,095.60>
G .T Rate	06-30-99	5.50	<4,456,095.60>	<61,519.64>	<4,517,615.24>
G .T Rate	09-30-99	5.50	<4,517,615.24>	<63,059.10>	<4,580,674.34>
G .T Rate	12-31-99	5.50	<4,580,674.34>	<63,939.31>	<4,644,613.65>
G .T Rate	03-31-00	5.50	<4,644,613.65>	<63,945.88>	<4,708,559.53>
GATT Rate	06-30-00	6.50	<4,708,559.53>	<76,707.34>	<4,785,266.87>
G .T Rate	08-15-00	6.50	<4,785,266.87>	<39,249.37>	<4,824,516.24>

Summary as of 08-15-00

	Amount	Payments	Deposits	Balance
T or IRS Check	19,531,729.45	<21,689,041>	0.00	<2,157,312.48>
I erest	793,513.63	<793,513.63>	0.00	0.00
C .T rate interest	<2,667,203.76>	0.00	0.00	<2,667,203.76>
F ered penalties	1,905.12	<1,905.12>	0.00	0.00
T als	17,659,944.44	<22,484,460>	0.00	<4,824,516.24>

P pared using: FEDERAL — IRS interest rates
T le end date: 09-30-00 — TVS Table

P pared using TaxInterest for Windows

Form **2220**
Department of the Treasury
Internal Revenue Service

Underpayment of Estimated Tax by Corporations

▶ Attach to your tax return.
▶ For Paperwork Reduction Act Notice, see back of form.

OMB No. 1545-0142

1983

Name: Commodity [illegible]

Employer identification number:

PART I.—How to Figure Your Underpayment

Note: *If you meet any of the exceptions that avoid the underpayment penalty for ALL quarters, complete only lines 9 through 13.*

1	1983 tax (Form 1120, line 31, page 1)	276,798
2	a Personal holding company tax included in line 1 (Form 1120, line 7, Schedule J)	
	b Credit for Federal tax on special fuels and oils (Form 1120, line 32(f), page 1) (See instructions)	
	c Minimum tax on tax preference items (Form 1120, line 9, Schedule J)	
3	Total—Add lines 2a through 2c	276,798
4	Subtract line 3 from line 1	[illegible]
5	90% of line 4	249,118

Enter in columns (a) through (d) the installment due dates (the 15th day of the 4th, 6th, 9th, and 12th months of your tax year) ▶	Due Dates of Installments (a)	(b)	(c)	(d)
	4/15/83	6/15/83	9/15/83	12/15/83
6 Enter 25% of line 5 in columns (a) through (d)	62,279.50	62,279.50	62,279.50	62,279.50
7 a Amount paid or credited for each period (see instructions)	-0-	3,000,000	2,500,000	-0-
b Overpayment of previous installment (see instructions)		0	2,937,720.50	5,437,720.50
c Add lines 7a and 7b		3,000,000	5,437,720.50	5,437,720.50
8 Underpayment (line 6 less line 7c) or overpayment (line 7c less line 6)	62,274.50	—	—	—

PART II.—Exceptions to the Penalty (Read instructions for lines 10 through 13 before entering an amount)

9 Total amount paid or credited from the beginning of the tax year through the installment dates that correspond to the 15th day of the 4th, 6th, 9th, and 12th months of your tax year		3,000,000	2,500,000	
10 a Exception 1, prior year's tax	25% of tax 126,774.75	50% of tax 253,342.15	75% of tax 380,182.25	100% of tax 506,949
b Large corporation's current year's tax (see instructions)	18.75% of tax	37.50% of tax	56.25% of tax	75% of tax
11 a Exception 2, tax on prior year's income based on the facts shown on the prior year's return but using current year's rates	25% of tax	50% of tax	75% of tax	100% of tax
b Large corporation's current year's tax (see instructions)	18.75% of tax	37.50% of tax	56.25% of tax	75% of tax
12 Exception 3, tax on annualized income (attach computation)	22.50% of tax	45% of tax	67.50% of tax	90% of tax
13 Additional exception for recurring seasonal income (see instructions)				

PART III.—How to Figure the Penalty

Enter the same installment dates used above ▶				
14 Amount of underpayment from line 8				
15 Enter the date of payment or the 15th day of the third month after the close of the tax year, whichever is earlier				
16 Number of days from due date of installment to the date shown on line 15				
17 Number of days on line 16 after 4/15/83, and before 7/1/83				
18 Number of days on line 16 after 6/30/83, and before 1/1/84				
19 Number of days on line 16 after 12/31/83, and before 7/1/84				
20 Number of days on line 16 after 6/30/84, and before 1/1/85				
21 Number of days on line 16 after 12/31/84, and before 2/16/85				
22 Number of days on line 17 / Number of days in the tax year x 16% x amount on line 14				
23 Number of days on line 18 / Number of days in the tax year x 11% x amount on line 14				
24 Number of days on line 19 / Number of days in the tax year x 11% x amount on line 14				
25 Number of days on line 20 / Number of days in the tax year x *% x amount on line 14				
26 Number of days on line 21 / Number of days in the tax year x **% x amount on line 14				
27 Underpayment penalty (total of lines 22 through 26)				
28 Add columns (a) through (d), line 27. Enter here and in space below line 33, Form 1120				

*A corporation whose tax year ends after March 31, 1984, see the instructions for line 25.
**A corporation whose tax year ends after September 30, 1984, see the instructions for line 26.

Form 2220 (1983)

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App. 167

BEST AVAILABLE COPY

Date of Computation: 08/01/2000

INTEREST AND PENALTY DETAIL REPORT — TaxInterest Version W2000.3
Taxpayer name...: Computervision 1983 — 08-01-00
Taxpayer ID#....: 04-2566004 — Page 1
Treat as C Corp.: Yes

Events	Date	Amount	Event Date Balance (1)
Tax	03-15-84	276,798.00	
Gen. adj.	03-15-84	3,597,591.00	
Gen. Adj.	03-15-84	83,974.00	
Payment	03-15-84	<4,606,074.44>	
Payment	03-15-84	<3,000,000.00>	
Payment	03-15-84	<2,500,000.00>	
Suspend interest	03-15-84		<6,147,711.44>
IRS Check (-High Rate 2,500,000.44)	04-04-84	2,500,000.44	<3,647,711.00>
IRS Check (-High Rate 997.29)	11-05-84	997.29	
offset to (-High Rate 15,014.98)	11-05-84	15,014.98	<3,631,698.73>
credit ele(-High Rate 7,314,261.02)	03-15-85	7,314,261.02	
Resume interest	03-15-85		3,682,562.29
Suspend interest	03-04-86		4,114,071.61
IRS Check (-High Rate 176,246.00)	03-05-86	176,246.00	
Resume interest	03-05-86		
NOL c/b 85	03-05-86	<176,246.00>	4,114,071.61
NOL c/b 85	03-15-86	<83,974.00>	
NOL c/b 85	03-15-86	<3,572,365.00>	469,017.95
OFFSET FROM 1982	04-28-89	<638,507.38>	0.00
Payment	03-13-97	<98,987.60>	<98,987.60>
Interest Computation Date	08-15-00		<120,923.96>

(1) Balance includes any interest and penalties accrued as of the Event Date

Interest Detail

Event	Date	Rate	Base	Interest	Balance
Tax	03-15-84		276,798.00		276,798.00
Gen. adj.	03-15-84		3,597,591.00		3,874,389.00
Gen. Adj.	03-15-84		83,974.00		3,958,363.00
Payment	03-15-84		<4,606,074.44>		<647,711.44>
Payment	03-15-84		<3,000,000.00>		<3,647,711.44>
Payment	03-15-84		<2,500,000.00>		<6,147,711.44>
Stop Int	03-15-84				
Interest	04-04-84	11.00	<6,147,711.44>		<6,147,711.44>
IRS Check	04-04-84		2,500,000.44		<3,647,711.00>
Interest	06-30-84	11.00	<3,647,711.00>		<3,647,711.00>
Interest	11-05-84	11.00	<3,647,711.00>		<3,647,711.00>
IRS Check	11-05-84		997.29		<3,646,713.71>
offset to 941 8403	11-05-84		15,014.98		<3,631,698.73>
Interest	12-31-84	11.00	<3,631,698.73>		<3,631,698.73>
Interest	03-15-85	13.00	<3,631,698.73>		<3,631,698.73>
credit elect	03-15-85		7,314,261.02		3,682,562.29
Start Int	03-15-85				
Interest	06-30-85	13.00	3,682,562.29	143,023.44	3,825,585.73
Interest	12-31-85	11.00	3,825,585.73	218,094.75	4,043,680.48
Interest	03-04-86	10.00	4,043,680.48	70,391.13	4,114,071.61
Stop Int	03-04-86				
Interest	03-05-86	10.00	4,114,071.61		4,114,071.61
IRS Check	03-05-86		176,246.00		4,290,317.61
Start Int	03-05-86				
NOL c/b 85	03-05-86		<176,246.00>		4,114,071.61

Prepared using TaxInterest for Windows

Date of Computation: 08/01/2000

INTEREST AND PENALTY DETAIL REPORT — TaxInterest Version W2000.3
Taxpayer name...: Computervision 1983 — 08-01-00
Taxpayer ID#....: 04-2566004 — Page 2
Treat as C Corp.: Yes
Interest Detail

Event	Date	Rate	Base	Interest	Balance
Interest	03-15-86	10.00	4,114,071.61	11,285.34	4,125,356.95
NOL c/b 85	03-15-86		<83,974.00>		4,041,382.95
NOL c/b 85	03-15-86		<3,572,365.00>		469,017.95
Interest	06-30-86	10.00	469,017.95	13,950.87	482,968.82
Interest	12-31-86	9.00	482,968.82	22,414.08	505,382.90
Interest	03-31-87	9.00	505,382.90	11,339.30	516,722.20
Interest	06-30-87	9.00	516,722.20	11,723.99	528,446.19
Interest	09-30-87	9.00	528,446.19	12,123.26	540,569.45
Interest	12-31-87	10.00	540,569.45	13,796.57	554,366.02
Interest	03-31-88	11.00	554,366.02	15,368.66	569,734.68
Interest	06-30-88	10.00	569,734.68	14,341.12	584,075.80
Interest	09-30-88	10.00	584,075.80	14,865.71	598,941.51
Interest	12-31-88	11.00	598,941.51	16,789.42	615,730.93
Interest	03-31-89	11.00	615,730.93	16,926.61	632,657.54
Interest	04-28-89	12.00	632,657.54	5,849.84	638,507.38
OFFSET FROM 1982	04-28-89		<638,507.38>		0.00
Interest	06-30-89	11.00			0.00
Interest	09-30-89	11.00			0.00
Interest	12-31-89	10.00			0.00
Interest	03-31-90	10.00			0.00
Interest	06-30-90	10.00			0.00
Interest	09-30-90	10.00			0.00
Interest	12-31-90	10.00			0.00
Interest	03-31-91	10.00			0.00
Interest	06-30-91	9.00			0.00
Interest	09-30-91	9.00			0.00
Interest	12-31-91	9.00			0.00
Interest	03-31-92	8.00			0.00
Interest	06-30-92	7.00			0.00
Interest	09-30-92	7.00			0.00
Interest	12-31-92	6.00			0.00
Interest	03-31-93	6.00			0.00
Interest	06-30-93	6.00			0.00
Interest	09-30-93	6.00			0.00
Interest	12-31-93	6.00			0.00
Interest	03-31-94	6.00			0.00
Interest	06-30-94	6.00			0.00
Interest	09-30-94	7.00			0.00
Interest	12-31-94	8.00			0.00
Interest	03-31-95	8.00			0.00
Interest	06-30-95	9.00			0.00
Interest	09-30-95	8.00			0.00
Interest	12-31-95	8.00			0.00
Interest	03-31-96	8.00			0.00
Interest	06-30-96	7.00			0.00
Interest	09-30-96	8.00			0.00
Interest	12-31-96	8.00			0.00
Interest	03-13-97	8.00			0.00
Payment	03-13-97		<98,987.60>		<98,987.60>
GATT Starts 03-13-97			Refund on start date.: <98,987.60>		
GATT Rate	03-31-97	6.50	<98,987.60>	<317.78>	<99,305.38>
GATT Rate	06-30-97	6.50	<99,305.38>	<1,622.26>	<100,927.64>

Prepared using TaxInterest for Windows

Date of Computation: 08/01/2000

INTEREST AND PENALTY DETAIL REPORT — TaxInterest Version W2000.3
Taxpayer name...: Computervision 1983 — 08-01-00
Taxpayer ID#....: 04-2566004 — Page 3
Treat as C Corp.: Yes
Interest Detail

Event	Date	Rate	Base	Interest	Balance
GATT Rate	09-30-97	6.50	<100,927.64>	<1,667.02>	<102,594.66>
GATT Rate	12-31-97	6.50	<102,594.66>	<1,694.56>	<104,289.22>
GATT Rate	03-31-98	6.50	<104,289.22>	<1,684.80>	<105,974.02>
GATT Rate	06-30-98	5.50	<105,974.02>	<1,463.05>	<107,437.07>
GATT Rate	09-30-98	5.50	<107,437.07>	<1,499.66>	<108,936.73>
GATT Rate	12-31-98	5.50	<108,936.73>	<1,520.59>	<110,457.32>
GATT Rate	03-31-99	4.50	<110,457.32>	<1,232.37>	<111,689.69>
GATT Rate	06-30-99	5.50	<111,689.69>	<1,541.96>	<113,231.65>
GATT Rate	09-30-99	5.50	<113,231.65>	<1,580.54>	<114,812.19>
GATT Rate	12-31-99	5.50	<114,812.19>	<1,602.61>	<116,414.80>
GATT Rate	03-31-00	5.50	<116,414.80>	<1,602.77>	<118,017.57>
GATT Rate	06-30-00	6.50	<118,017.57>	<1,922.63>	<119,940.20>
GATT Rate	08-15-00	6.50	<119,940.20>	<983.76>	<120,923.96>

Summary as of 08-15-00

	Amount	Payments	Deposits	Balance
Tax or IRS Check	13,964,882.73	<14,063,870>	0.00	<98,987.60>
Interest	612,284.09	<612,284.09>	0.00	0.00
GATT rate interest	<21,936.36>	0.00	0.00	<21,936.36>
Totals	14,555,230.46	<14,676,154>	0.00	<120,923.96>

Prepared using: FEDERAL — IRS interest rates
Table end date: 09-30-00 — TVS Table

Prepared using TaxInterest for Windows

Form 2285 (Rev. November 1989) Department of the Treasury Internal Revenue Service	Concurrent Determinations of Deficiencies (*Increase in Tax*) and Overassessments (*Decreases in Tax*) in Cases Involving Restricted Interest Provisions of the Internal Revenue Code	Taxpayer's Name and Identification Number Computervision Corporation and Subsidiaries	Taxable Year Ended 8312
		Power of Attorney's Name and Address	

Section I - Computation of Increase (*Decrease*) in Tax

Amounts representing decreases in tax are enclosed in parenthesis in Sections I and II.

Prepared by (*Signature*) | Date 05/19/99

Interest Notice CI No. CI No. Allowed under Code section I.R.C.	General Adjustments (a)	Other (b)	Carryback Losses or Credits From: First Succeeding Taxable Year 12/31/85 (c)	Second Succeeding Taxable Year 12/31/86 (d)	Third Succeeding Taxable Year (e)	After All Adjustments (f)
1. Taxable income	21,854,132		22,036,615	2,082,929	-	21,854,132
2. Net adjustments	182,483		(19,953,686)	(2,082,929)		(21,854,132)
3. Correct taxable income	22,036,615	-	2,082,929	-	-	-
4. Tentative income tax						
5. Current tax credits						
6. Less tax credit carryback						
7. Income tax	3,958,363	-	125,778	125,778	125,778	125,778
8. Previous tax liability	3,874,389		3,958,363	125,778	125,778	3,874,389
9. Increase (decrease) in tax	83,974	-	(3,832,585)	-	-	(3,748,611)
10. Tentative allowance			3,748,611	-		3,748,611
11. Net increase (decrease) in tax	83,974	-	(83,974)	-	-	-

Section II - Interest Worksheet

1. Increase/Decrease in tax $ _____
2. _____
3. _____
4. _____

870 Date: _____
23C Date: _____

Amount	From	To	Interest	Comments

5. _____ Increase/Decrease in tax

Name		Date of Computations	Interest to be Charged/Allowed
			$ _____

Form 2285 (Rev. 11-89)

Form **2285** (Rev. March 1981)
Department of the Treasury
Internal Revenue Service

Concurrent Determinations of Deficiencies (Increases in Tax) and Overassessments (Decreases in Tax) in Cases Involving Restricted Interest Provisions of the Internal Revenue Code

Name of Taxpayer: Computervision Corporation & Subs
Address:
Taxable Year Ended: 12/31/83

Section I - Computation of Increase (Decrease) in Tax

Amounts representing decreases in tax are enclosed in parentheses in Sections I and II

Prepared by (Signature): Edward J. Kiecke
Date: 1/14/98

Interest Notice CI No. / CI No. / Allowed under Code section I.R.C.	General Adjustments (a)	Other (b)	Carryback Losses or Credits From: First Succeeding Taxable Year ____ (c)	Second Succeeding Taxable Year 12/31/85 (d)	Third Succeeding Taxable Year 12/31/86 (e)	After All Adjustments (f)
1. Taxable income for income tax purposes	14,668,229			21,854,132	2,082,929	14,668,229
2. Net adjustments	7,185,903			(19,771,203)	2,082,929	(14,668,229)
3. Correct taxable income	21,854,132			2,082,929	-0-	-0-
4. Tentative income tax				125,718	125,718	
5. Less tax credit carryback				—	—	
6. Income tax	3,814,389			125,718	125,718	125,718
7. Previous tax liability	216,798			3,814,389	125,718	216,798
8. Increase (decrease) in tax	3,597,591			(3,148,611)	-0-	(151,020)
9. Tentative allowance	—			176,246	—	176,246
10. Net increase (decrease) in tax	3,597,591			(3,512,365)	-0-	25,226

Section II - Interest Worksheet (Interest on general adjustments tax increase (decrease))

1. Increase in tax to be charged $ ____

	Amount	Factor	From	To	Interest
2. ____					
3.					
4.					
5.					
6. ____					

(Line 6 is the total of lines 3, 4, and 5)

7. ____ Remainder of general adjustments tax increase (decrease). Interest on this and other increases in tax computed below.

8.					
9.					
10.					
11.					
12.					
13.					

14. ____ Increase in tax to be charged — Initials and Date — Interest to be charged $ ____

Form 2285 (Rev. 3-81)

Form **2220**
Department of the Treasury
Internal Revenue Service

Underpayment of Estimated Tax by Corporations

▶ Attach to your tax return.
▶ For Paperwork Reduction Act Notice, see back of form.

OMB No. 1545-0142

1984

Name: Computer Magic

Employer identification number:

Part I How to Figure Your Underpayment

Note: If you meet any of the exceptions that avoid the underpayment penalty for ALL quarters, complete only lines 9 through 13.

1	1984 tax (Line 31, Form 1120; Line 27, Form 1120-A; or comparable line for other income tax returns)	13,148,270
2	a Personal holding company tax included in line 1 (Schedule PH (Form 1120), line 15)	
	b Credit for Federal tax on gasoline and special fuels (See instructions)	
	c Minimum tax on tax preference items (Form 4626, line 12)	
3	Total—Add lines 2a through 2c	
4	Subtract line 3 from line 1	13,148,270
5	90% of line 4	11,833,407

Enter in columns (a) through (d) the installment due dates (the 15th day of the 4th, 6th, 9th, and 12th months of your tax year) ▶	Due Dates of Installments (a)	(b)	(c)	(d)
	4/15/84	6/15/84	9/15/84	12/15/84
6 Enter 25% of line 5 in columns (a) through (d)	2,958,351.75	2,958,351.75	2,958,351.75	2,958,351.75
7 a Amount paid or credited for each period (see instructions)	7,100,000	3,000,800.00	7,100,000	-0-
b Overpayment of previous installment (see instructions)		4,041,648.25	4,083,296.50	4,124,944.
c Add lines 7a and 7b	7,000,000	7,041,648.25	7,083,296.50	4,124,944.
8 Underpayment (line 6 less line 7c) or overpayment (line 7c less line 6)	—	—	—	—

Part II Exceptions to the Penalty (Read instructions for lines 10 through 13 before entering an amount)

9 Total amount paid or credited from the beginning of the tax year through the installment dates that correspond to the 15th day of the 4th, 6th, 9th, and 12th months of your tax year				
10 Exception 1, prior year's tax. (Note: Not applicable for "large corporations" (see instructions).)	25% of tax	50% of tax	75% of tax	100% of tax
11 Exception 2, tax on prior year's income based on the facts shown on the prior year's return but using current year's rates. (Note: Not applicable for "large corporations" (see instructions).)	25% of tax	50% of tax	75% of tax	100% of tax
12 Exception 3, tax on annualized income (attach computation)	22.50% of tax	45% of tax	67.50% of tax	90% of tax
13 Additional exception for recurring seasonal income (see instructions)				

Part III How to Figure the Penalty

Enter the same installment dates used above ▶				
14 Amount of underpayment from line 8				
15 Enter the date of payment or the 15th day of the 3d month after the close of the tax year, whichever is earlier				
16 Number of days from due date of installment to the date shown on line 15				
17 Number of days on line 16 after 4/15/84, and before 1/1/85				
18 Number of days on line 16 after 12/31/84, and before 7/1/85				
19 Number of days on line 16 after 6/30/85, and before 1/1/86				
20 Number of days on line 16 after 12/31/85, and before 2/16/86				
21 Number of days on line 17 / Number of days in the tax year x 11% x amount on line 14				
22 Number of days on line 18 / Number of days in the tax year x 13% x amount on line 14				
23 Number of days on line 19 / Number of days in the tax year x **% x amount on line 14				
24 Number of days on line 20 / Number of days in the tax year x **% x amount on line 14				
25 Underpayment penalty (total of lines 21 through 24)				
26 Add columns (a) through (d), line 25. Enter here and on line 33, Form 1120; Line 29, Form 1120-A; or comparable line for other income tax returns				

*A corporation whose tax year ends after March 31, 1985, see the instructions for line 23.
**A corporation whose tax year ends after September 30, 1985, see the instructions for line 24.

Form 2220 (198

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App. 173

Date of Computation: 08/01/2000

INTEREST AND PENALTY DETAIL REPORT — TaxInterest Version W2000.3
Taxpayer name...: Computervision 1984 — 08-01-00
Taxpayer ID#....: 04-2566004 — Page 1
Treat as C Corp.: No

Events	Date	Amount	Event Date Balance (1)
Resume interest	03-06-84		0.00
Gen. Adj.	03-15-85	375,908.00	
Gen. Adj.	03-15-85	62,536.00	
Tax	03-15-85	13,148,230.00	
Payment	03-15-85	<7,000,000.00>	
Payment	03-15-85	<3,000,000.00>	
Payment	03-15-85	<7,314,261.02>	
Suspend interest	03-15-85		
Payment	03-15-85	<3,000,000.00>	<6,727,587.02>
Resume interest	08-02-85		
IRS Check (-High Rate 7,166,031.02)	08-02-85	7,166,031.02	438,444.00
Suspend interest	03-04-86		
NOL c/b 85	03-04-86	<13,113,582>	<12,646,740>
IRS Check (-High Rate13,113,582.00)	03-06-86	13,113,582.00	
Resume interest	03-06-86		466,841.60
NOl recap. 1985	03-15-86	394,578.00	
NOL recapture 85	03-15-86	2,069,251.00	2,931,822.98
NOL recap. 1986	03-15-87	<457,114.00>	
NOL c/b 86	03-15-87	<2,412,880.00>	347,311.01
OFFSET FROM 8212	04-28-89	<430,864.32>	0.00
Interest Computation Date	08-15-00		0.00

(1) Balance includes any interest and penalties accrued as of the Event Date

Interest Detail

Event	Date	Rate	Base	Interest	Balance
Start Int	03-06-84				
Interest	06-30-84	11.00			0.00
Interest	12-31-84	11.00			0.00
Interest	03-15-85	13.00			0.00
Gen. Adj.	03-15-85		375,908.00		375,908.00
Gen. Adj.	03-15-85		62,536.00		438,444.00
Tax	03-15-85		13,148,230.00		13,586,674.00
Payment	03-15-85		<7,000,000.00>		6,586,674.00
Payment	03-15-85		<3,000,000.00>		3,586,674.00
Payment	03-15-85		<7,314,261.02>		<3,727,587.02>
Stop Int	03-15-85				
Payment	03-15-85		<3,000,000.00>		<6,727,587.02>
Interest	06-30-85	13.00	<6,727,587.02>		<6,727,587.02>
Interest	08-02-85	11.00	<6,727,587.02>		<6,727,587.02>
Start Int	08-02-85				
IRS Check	08-02-85		7,166,031.02		438,444.00
Interest	12-31-85	11.00	438,444.00	20,410.01	458,854.01
Interest	03-04-86	10.00	458,854.01	7,987.59	466,841.60
Stop Int	03-04-86				
NOL c/b 85	03-04-86		<13,113,582>		<12,646,740>
Interest	03-06-86	10.00	<12,646,740>		<12,646,740>
IRS Check	03-06-86		13,113,582.00		466,841.60
Start Int	03-06-86				
Interest	03-15-86	10.00	466,841.60	1,152.38	467,993.98
NOl recap. 1985	03-15-86		394,578.00		862,571.98

Prepared using TaxInterest for Windows

Date of Computation: 08/01/2000

INTEREST AND PENALTY DETAIL REPORT — TaxInterest Version W2000.3
Taxpayer name...: Computervision 1984 — 08-01-00
Taxpayer ID#....: 04-2566004 — Page 2
Treat as C Corp.: No
Interest Detail

Event	Date	Rate	Base	Interest	Balance
NOL recapture 85	03-15-86		2,069,251.00		2,931,822.98
Interest	06-30-86	10.00	2,931,822.98	87,206.64	3,019,029.62
Interest	12-31-86	9.00	3,019,029.62	140,110.04	3,159,139.66
Interest	03-15-87	9.00	3,159,139.66	58,165.35	3,217,305.01
NOL recap. 1986	03-15-87		<457,114.00>		2,760,191.01
NOL c/b 86	03-15-87		<2,412,880.00>		347,311.01
Interest	03-31-87	9.00	347,311.01	1,372.75	348,683.76
Interest	06-30-87	9.00	348,683.76	7,911.34	356,595.10
Interest	09-30-87	9.00	356,595.10	8,180.77	364,775.87
Interest	12-31-87	10.00	364,775.87	9,309.91	374,085.78
Interest	03-31-88	11.00	374,085.78	10,370.76	384,456.54
Interest	06-30-88	10.00	384,456.54	9,677.38	394,133.92
Interest	09-30-88	10.00	394,133.92	10,031.37	404,165.29
Interest	12-31-88	11.00	404,165.29	11,329.49	415,494.78
Interest	03-31-89	11.00	415,494.78	11,422.07	426,916.85
Interest	04-28-89	12.00	426,916.85	3,947.47	430,864.32
OFFSET FROM 8212	04-28-89		<430,864.32>		0.00
Interest	06-30-89	11.00			0.00
Interest	09-30-89	11.00			0.00
Interest	12-31-89	10.00			0.00
Interest	03-31-90	10.00			0.00
Interest	06-30-90	10.00			0.00
Interest	09-30-90	10.00			0.00
Interest	12-31-90	10.00			0.00
Interest	03-31-91	10.00			0.00
Interest	06-30-91	9.00			0.00
Interest	09-30-91	9.00			0.00
Interest	12-31-91	9.00			0.00
Interest	03-31-92	8.00			0.00
Interest	06-30-92	7.00			0.00
Interest	09-30-92	7.00			0.00
Interest	12-31-92	6.00			0.00
Interest	03-31-93	6.00			0.00
Interest	06-30-93	6.00			0.00
Interest	09-30-93	6.00			0.00
Interest	12-31-93	6.00			0.00
Interest	03-31-94	6.00			0.00
Interest	06-30-94	6.00			0.00
Interest	09-30-94	7.00			0.00
Interest	12-31-94	8.00			0.00
Interest	03-31-95	8.00			0.00
Interest	06-30-95	9.00			0.00
Interest	09-30-95	8.00			0.00
Interest	12-31-95	8.00			0.00
Interest	03-31-96	8.00			0.00
Interest	06-30-96	7.00			0.00
Interest	09-30-96	8.00			0.00
Interest	12-31-96	8.00			0.00
Interest	03-31-97	8.00			0.00
Interest	06-30-97	8.00			0.00
Interest	09-30-97	8.00			0.00
Interest	12-31-97	8.00			0.00
Interest	03-31-98	8.00			0.00
Interest	06-30-98	7.00			0.00

Prepared using TaxInterest for Windows

Date of Computation: 08/01/2000

INTEREST AND PENALTY DETAIL REPORT — TaxInterest Version W2000.3
Taxpayer name...: Computervision 1984 — 08-01-00
Taxpayer ID#....: 04-2566004 — Page 3
Treat as C Corp.: No
Interest Detail

Event	Date	Rate	Base	Interest	Balance
Interest	09-30-98	7.00			0.00
Interest	12-31-98	7.00			0.00
Interest	03-31-99	7.00			0.00
Interest	06-30-99	8.00			0.00
Interest	09-30-99	8.00			0.00
Interest	12-31-99	8.00			0.00
Interest	03-31-00	8.00			0.00
Interest	06-30-00	9.00			0.00
Interest	08-15-00	9.00			0.00

Summary as of 08-15-00

	Amount	Payments	Deposits	Balance
Tax or IRS Check	36,330,116.02	<36,330,116>	0.00	0.00
Interest	398,585.32	<398,585.32>	0.00	0.00
Totals	36,728,701.34	<36,728,701>	0.00	0.00

Prepared using: FEDERAL — IRS interest rates
Table end date: 09-30-00 — TVS Table

Prepared using TaxInterest for Windows

Form 2285 (Rev. November 1989) Department of the Treasury Internal Revenue Service	Concurrent Determinations of Deficiencies (*Increase in Tax*) and Overassessments (*Decreases in Tax*) in Cases Involving Restricted Interest Provisions of the Internal Revenue Code	Taxpayer's Name and Identification Number Computervision Corporation and Subsidiaries	Taxable Year Ended 8412
		Power of Attorney's Name and Address	

Section I - Computation of Increase (*Decrease*) in Tax

Amounts representing decreases in tax are enclosed in parenthesis in Sections I and II.

Prepared by (Signature)

Date 5/19/99

Interest Notice CI No. CI No. Allowed under I.R.C. Code section	General Adjustments (a)	Other (b)	Carryback Losses or Credits From: First Succeeding Taxable Year 85 (c)	Second Succeeding Taxable Year 84 (d)	Third Succeeding Taxable Year _____ (e)	After All Adjustments (f)
1. Taxable income	50,884,759		$1,064,727	27,237,794	-	50,884,759
2. Net adjustments	179,968		(23,826,937)	(27,237,794)	-	(50,884,759)
3. Correct taxable income	$1,064,727	-	27,237,794	-	-	-
4. Tentative income tax			2,936,921	66,927		
5. Current tax credits						
6. Less tax credit carryback						
7. Income tax	13,586,674	-	2,936,921	66,927	-	66,927
8. Previous tax liability	13,524,138		13,586,674	2,936,921	-	13,524,138
9. Increase (decrease) in tax	62,536	-	(10,649,753)	(2,869,994)	-	(13,457,211)
10. Tentative allowance			11,044,331	2,412,880	-	13,457,211
11. Net increase (decrease) in tax	62,536	-	394,578	(457,114)	-	-

Section II - Interest Worksheet

1. _____ Increase/Decrease in tax $ _____
2. _____
3. _____
4. _____

870 Date: _____
23C Date: _____

Amount	From	To	Interest	Comments

5. _____ Increase/Decrease in tax

Name		Date of Computations	Interest to be Charged/Allowed

$ _____

Form **2285** (Rev. March 1981)
Department of the Treasury
Internal Revenue Service

Concurrent Determinations of Deficiencies (Increases in Tax) and Overassessments (Decreases in Tax) In Cases Involving Restricted Interest Provisions of the Internal Revenue Code

Name of Taxpayer: Computervision Corporation & Subs
Address:
Taxable Year Ended: 12/31/84

Section I - Computation of Increase (Decrease) in Tax

Amounts representing decreases in tax are enclosed in parentheses in Sections I and II

Prepared by (Signature): Edward A. Kimble
Date: 1/14/98

Interest Notice CI No. / CI No. / Allowed under Code section I.R.C.	General Adjustments (a)	Other (b)	Carryback Losses or Credits From: First Succeeding Taxable Year 12/31/85 (c)	Second Succeeding Taxable Year 12/31/86 (d)	Third Succeeding Taxable Year ____ (e)	After All Adjustments (f)
1. Taxable income for income tax purposes	52,782,588		50,884,759	26,875,343		52,782,588
2. Net adjustments	(1,897,829)		(24,009,416)	(26,875,343)		(52,782,588)
3. Correct taxable income	50,884,759		26,875,343	0		0
4. Tentative income tax			2,479,807	66,927		
5. Less tax credit carryback			—	—		
6. Income tax	13,524,138		2,479,807	66,927		66,927
7. Previous tax liability	13,148,230		13,524,138	2,479,807		13,148,230
8. Increase (decrease) in tax	375,908		(11,044,331)	(2,412,880)		(13,081,303)
9. Tentative allowance	—		13,113,582	—		13,113,582
10. Net increase (decrease) in tax	375,908		2,069,251	(2,412,880)		32,279

Section II - Interest Worksheet (Interest on general adjustments (as increase (decrease))

1. Increase in tax to be charged $ ____

	Amount	Factor	From	To	Interest
2. ____					
3.	32,279		8/2/85	7/13/98	[illegible]
4.	2,069,251		[illegible]	3/15/87	281,[illegible]
5.	[illegible]		[illegible]	[illegible]	[illegible]
6. ____					

(Line 6 is the total of lines 3, 4, and 5)

7. Remainder of general adjustments (as increase (decrease)). Interest on this and other increases in tax computed below.

8.	75,[illegible]		7/15/[illegible]	7[illegible]	[illegible]
9.	201,[illegible]		[illegible]	[illegible]	
10.	59,[illegible]		[illegible]	[illegible]	
11.					
12.					
13.					

14. ____ Increase in tax to be charged — Initials and Date — Interest to be charged $ ____

Form 2285 (Rev. 1981)

FILED
MAR 12 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-759

In the Supreme Court of the United States

COMPUTERVISION CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
EILEEN J. O'CONNOR
Assistant Attorney General
BRUCE R. ELLISEN
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(202) 514-2217

QUESTIONS PRESENTED

1. Whether a purported waiver of the requirements of 26 C.F.R. 301.6402-2(b)(1) regarding the form and specificity of a tax refund claim is ineffective after the statutory period for filing a refund claim has expired.

2. Whether an administrative refund claim is no longer pending with the Internal Revenue Service, and therefore cannot be amended, once the taxpayer files a suit for refund.

3. Whether petitioner's untimely amendment of its refund claim was not germane to, and thus did not relate back to, its original refund claim.

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In the Supreme Court of the United States

No. 06-759

COMPUTERVISION CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-33) is reported at 445 F.3d 1355. The supplemental opinion of the court of appeals on petition for rehearing (Pet. App. 34-38) is reported at 467 F.3d 1322. The decision of the United States Court of Federal Claims (Pet. App. 39-118) is reported at 62 Fed. Cl. 299.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2006. A petition for rehearing was denied on August 30, 2006 (Pet. App. 119-120). The petition for a writ of certiorari was filed on November 28, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Internal Revenue Code authorizes the Internal Revenue Service (IRS) to refund an overpayment of tax or interest "within the applicable period of limitations." 26 U.S.C. 6402(a). An administrative claim for refund of an overpayment of tax or interest must be filed within three years from the time the return was filed, or two years from the time the tax was paid, whichever is later. 26 U.S.C. 6511(a). The IRS cannot allow a refund after the limitation period in Section 6511(a) has expired "unless a claim for credit or refund is filed by the taxpayer within such period." 26 U.S.C. 6511(b)(1).

"No suit * * * shall be maintained in any court" for a tax refund until an administrative refund claim has been "duly filed" with the IRS. 26 U.S.C. 7422(a). That requirement is a jurisdictional prerequisite. *United States* v. *Dalm*, 494 U.S. 596, 601-602 (1990). The administrative refund request must comply with "the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." 26 U.S.C. 7422(a).

The Treasury regulations further provide:

> No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. * * * A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

26 C.F.R. 301.6402-2(b)(1). "[C]ourts have long interpreted § 7422(a) and Treasury Reg. § 301.6402-2(b)(1) as stating a 'substantial variance' rule which bars a taxpayer from presenting claims in a tax refund suit that 'substantially vary' the legal theories and factual bases set forth in the tax refund claim presented to the IRS." *Lockheed Martin Corp.* v. *United States*, 210 F.3d 1366, 1371 (Fed. Cir. 2000). Prohibiting the taxpayer from substantially varying from its administrative claim "(1) gives the IRS notice as to the nature of the claim and the specific facts upon which it is predicated; (2) gives the IRS an opportunity to correct errors; and (3) limits any subsequent litigation to those grounds that the IRS had an opportunity to consider and is willing to defend." *Ibid.*

The IRS may waive the requirement of 26 C.F.R. 301.6402-2(b)(1) that a claim set forth the specific grounds for a refund, but it may not waive the provisions of Section 6511(a) or Section 7422(a) requiring the timely filing of a claim for refund. *United States* v. *Garbutt Oil Co.*, 302 U.S. 528, 533 (1938); see *Angelus Milling Co.* v. *Commissioner*, 325 U.S. 293, 296 (1945). This Court has explained: "while the Commissioner might have enforced the regulation and rejected a claim for failure to comply with it in omitting to state with particularity the grounds on which the claim was based, he was not bound to do so, but might waive the requirement of the regulation and consider a general claim on its merits." *Garbutt Oil*, 302 U.S. at 533; see *Angelus Milling*, 325 U.S. at 294-295; *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62, 71 (1933). But "no officer of the government has power to waive the statute of limitations." *Garbutt Oil*, 302 U.S. at 534.

A claim for refund may be amended at any time while the limitation period on filing a claim is still open. Once the limitation period expires, however, an amendment to a claim cannot be considered unless it is germane to a timely filed claim. *United States* v. *Andrews*, 302 U.S. 517, 524 (1938). An amendment is germane if it "merely makes more definite the matters already within [the IRS's] knowledge, or which, in the course of [its] investigation, [it] would naturally have ascertained." *Ibid.* An amendment filed after the limitation period has expired that does not relate back to a timely filed claim, and, thus, constitutes a new claim, cannot be considered by the IRS. See 26 U.S.C. 6511(b)(1); *Garbutt Oil*, 302 U.S. at 535. In addition, a claim may not be amended after expiration of the limitation period unless the original claim is still pending before the IRS. See *Memphis Cotton Oil*, 288 U.S. at 72.

2. This case arises from petitioner's claim for refund of deficiency interest for its 1982 tax year. The IRS determined that petitioner's 1982 income tax return understated its tax liability and proposed a deficiency. A portion of the deficiency related to the IRS's determination that petitioner's subsidiary did not qualify as a domestic international sales corporation (DISC) under 26 U.S.C. 992. Pet. App. 3, 145. Another portion of the deficiency related to other, non-DISC issues. The parties settled the amount of the non-DISC tax liability. *Ibid.*

The carryback of a net operating loss from petitioner's 1985 tax year to 1982 offset virtually all of the deficiency, but did not eliminate interest owed on the deficiency. Pet. App. 4, 145-146. The IRS assessed interest in the amount of $2,808,888 attributable to the still-disputed DISC qualification issue, and interest in the amount of $1,254,186 attributable to the resolved

non-DISC issues. *Id.* at 4. In 1989, petitioner paid the assessed interest, with the final payment occurring on April 28, 1989. *Ibid.* Within two years of the final payment, on August 4, 1989, petitioner filed a claim for refund, in which it claimed "'that portion of the interest relating to the [DISC] disqualification issue' for the 1982 tax year," and specifically requested $2,808,888. *Id.* at 4-5, 132, 134-142. Although the claim contained a "boilerplate provision" seeking "such other grounds as are shown to be appropriate," *id.* at 5, the claim did not request a refund of any interest paid on the portion of the deficiency attributable to the non-DISC issues that had been settled. *Id.* at 15. After six months passed without the IRS acting on the claim for refund, petitioner filed this suit in the Court of Federal Claims on April 4, 1990. *Id.* at 5, 147.

Petitioner also was issued a notice of deficiency for other tax years as a result of the DISC disqualification, and it petitioned the United States Tax Court to redetermine the deficiencies. Pet. App. 5, 147. The Court of Federal Claims stayed proceedings in this case pending resolution of the DISC issue in the Tax Court. *Id.* at 5, 148. The Tax Court decided the DISC issue in petitioner's favor, and petitioner and the Department of Justice (DOJ) began negotiating a settlement of the present case. *Id.* at 5-6, 148-150. In May and September 2000, petitioner requested in letters to DOJ and the IRS that the principles of "interest netting" and "interest suspension" be applied in computing its refund. *Id.* at 6, 150, 157.[1] Although the IRS responded to one let-

[1] Interest suspension refers to the following rule: "When a taxpayer reports an overpayment on its income tax return, interest will be assessed on that portion of a subsequently determined deficiency for the overpayment return year that is less than or equal to the overpay-

ter with statements suggesting that interest suspension could be applied, DOJ responded that petitioner had not timely filed a claim for refund on the basis of interest suspension. Pet. App. 6-7, 150.

On April 4, 2002, petitioner filed an amended claim for refund with the IRS to include interest-netting and interest-suspension claims with respect to the interest on the non-DISC deficiencies. Pet. App. 7, 151. On July 9, 2003, petitioner filed an amended complaint in the Court of Federal Claims asserting those claims and requesting an additional $820,946 in deficiency interest. *Id.* at 7, 51. The government moved to dismiss the claims. *Id.* at 51-52.

3. The Court of Federal Claims granted the government's motion to dismiss petitioner's claim for a refund of deficiency interest on the non-DISC deficiencies based on interest suspension because petitioner failed to file a timely administrative refund claim for that interest. Pet. App. 39-118. The court entered judgment for petitioner in the amount of the deficiency interest attributable to the DISC issue, to which the government conceded petitioner was entitled. *Id.* at 118.

The court observed that petitioner timely filed its original refund claim in August 1989 for deficiency interest. Pet. App. 65. The court determined, however, that

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ment as of: (1) the date on which the Service refunds the overpayment without interest; or (2) the date on which the overpayment is applied to the succeeding year's estimated taxes." Rev. Rul. 99-40, 1999-2 C.B. 441, 443. Interest netting refers to the relief available under 26 U.S.C. 6621(d), which provides for a net interest rate of zero during overlapping periods when underpayment interest is payable and overpayment interest is allowable on equivalent underpayments and overpayments of tax. In this case, interest suspension and interest netting would have provided petitioner the same relief. Petitioner does not press its interest-netting claim in this Court.

petitioner's original claim sought a refund only with respect to the interest related to the DISC issue and that the claim was based primarily on the contention that the IRS had erred in disqualifying its subsidiary as a DISC. *Id.* at 65-66. The court held that the doctrine of "substantial variance," which precludes a taxpayer "from substantially varying the legal or factual basis of an administrative claim when before a court," barred petitioner's interest-suspension claim. *Id.* at 66.

The court rejected petitioner's contention that its original refund claim included an interest-suspension claim. The court concluded that petitioner's "original refund claim did not include, explicitly or implicitly, a claim that interest suspension be applied to interest assessed on a deficiency corresponding to issues that were settled prior to the filing of the claim." Pet. App. 92. That claim, the court observed, "simply does not suggest to the IRS that [petitioner] is seeking deficiency interest for the 1982 tax year unrelated to the DISC issue, based on the principle of interest suspension." *Id.* at 98.

The court rejected petitioner's argument that the IRS had waived the variance defense by addressing interest suspension in an August 2000 letter to petitioner. Pet. App. 100-105. The August 2000 IRS letter to petitioner included draft, revised interest computations applying the principle of interest suspension to tax year 1982, and stated that "Revenue Ruling 99-40 (Sequa) is applied regarding the credit elect to 1983. No claim is necessary." *Id.* at 101; see note 1, *supra* (describing Rev. Rul. 99-40, *supra.*). The court observed that, on October 25, 2000, DOJ sent petitioner a letter specifically disputing the application of interest suspension to tax year 1982 "*absent the filing of a timely claim for refund raising the issue.*" Pet. App. 101 (quoting DOJ

letter). The court concluded, *inter alia*, that there could be no waiver by IRS conduct that "occurred in 2000, nine years after the statute of limitations for filing a refund claim expired in 1991," because any waiver "must occur within the applicable statutory time period." *Id.* at 103.

The court also rejected petitioner's contention that its amended claim for refund, filed in 2002, related back to the original 1989 claim. Pet. App. 105-110. The court found that petitioner's amended claim was not germane to the original claim, which raised only the DISC issue. *Id.* at 106-107. The court further held that, in any event, the amendment could not relate back because "[a]n amendment to a refund claim submitted after the expiration of the applicable statute of limitations may only be made if the original claim is still pending" with the IRS, and, in this case, the claim ceased to be pending with the IRS when petitioner filed suit. *Id.* at 108-110.

4. The court of appeals affirmed. Pet. App. 1-33. In describing the substantial-variance doctrine, the court identified four limited situations in which a claim for a refund may be considered "despite failure to timely file detailed formal claims with the IRS," *id.* at 12: (1) the "informal claim doctrine," which allows consideration of a timely claim with formal defects if it "fairly apprises the IRS of the basis for the claim" (*id.* at 13-15); (2) the "waiver doctrine," which allows consideration of a specific claim for relief not raised in the original claim if it is nevertheless considered by the IRS before the limitation period expires (*id.* at 15-21); (3) the "general claim doctrine," which allows consideration of an untimely amendment to a timely, general claim under certain circumstances (*id.* at 21-24); and (4) the "germaneness doctrine," which allows consideration of an untimely amend-

ment to a timely, specific claim where the amendment is germane to the original claim and is filed while the original claim remains pending with the IRS (*id.* at 24-30).

The court of appeals concluded that none of the exceptions applied to petitioner's untimely claim for interest suspension. The informal claim doctrine did not apply because petitioner's original refund claim was formal and specific with respect to the DISC issue. Pet. App. 15. The doctrine of waiver did not apply because the purported waiver occurred after the limitation period had expired. *Id.* at 20-21. The general claim doctrine did not assist petitioner because the original refund claim was not general but was specific. *Id.* at 23-24. And the germaneness doctrine did not apply because the interest-suspension claim was not germane to the DISC claim (*id.* at 27-28), and, in the alternative, because the interest-suspension claim had been filed after the IRS had already lost jurisdiction over the DISC claim by virtue of petitioner's decision to file suit rather than await an IRS decision on the claim (*id.* at 28-30). Accordingly, the court of appeals affirmed the dismissal of petitioner's interest-suspension claim.[2]

ARGUMENT

Petitioner contends that the court of appeals erred in its articulation of the waiver and germaneness exceptions to the rule that a taxpayer cannot substantially vary in court the legal or factual basis of its administrative refund claim. The decision of the court of appeals is correct and does not conflict with any decision of this

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[2] In response to a letter from the government, the court of appeals issued a supplemental opinion (Pet. App. 34-38) regarding the interest-netting claim, which is not at issue here.

Court or of any other court of appeals. Further review is not warranted.

1. a. The court of appeals correctly rejected (Pet. App. 15-21) petitioner's contention that the IRS waived petitioner's failure to file a timely administrative claim seeking interest suspension on the interest attributable to the non-DISC deficiencies. Petitioner made its final payment of deficiency interest for the 1982 tax year on April 28, 1989, and the period for filing a refund claim for such interest thus expired on April 28, 1991. See 26 U.S.C. 6511(a). Although petitioner filed a timely, formal administrative claim for a refund within that period, that claim contained "a specific request for DISC-related interest" attributable to the IRS's disqualification of its subsidiary as a DISC. Pet. App. 23. That administrative claim contained no specific request for refund of the interest related to the non-DISC deficiencies, *id.* at 15, and raised no claim based on the theory of interest suspension, *id.* at 66. The interest-suspension theory was not raised until nine years after the expiration of the applicable limitation period, when the IRS applied it in draft computations in a 2000 letter to petitioner. *Id.* at 21. Petitioner did not file a formal administrative claim seeking a refund of the interest on the non-DISC deficiencies based on the interest-suspension theory until more than 10 years after the statutory deadline. *Id.* at 10-11.

The IRS's 2000 letter suggesting the applicability of interest suspension could not make petitioner's claim here timely. This Court rejected an assertion of waiver in similar circumstances in *United States* v. *Garbutt Oil Co.*, 302 U.S. 528 (1938). There, as here, "the original claim was specific and the so-called amendment completely shifted to a totally different ground for refund."

Id. at 531. There, as here, the amendment was untimely. *Id.* at 530. In such circumstances, the Court held that the IRS cannot waive the failure of the original claim to raise the new claim, because that would be equivalent to waiving the limitation period, and "no officer of the government has power to waive the statute of limitations." *Id.* at 534.

b. Petitioner asserts a conflict (Pet. 13-14) with decisions of the Second and Fifth Circuits. But neither of the cases cited by petitioner squarely addressed whether the IRS can waive compliance with the Treasury regulation after expiration of the limitation period. Rather, those cases turned on whether the IRS's conduct in fact amounted to a waiver. See *United States* v. *Henderson Clay Prods.*, 324 F.2d 7, 18 (5th Cir. 1963) (concluding that "[o]n this record there is ample support for the District Judge's finding that the Commissioner did in fact waive the provisions of [the regulation] requiring the facts * * * to be set forth" and that the new count "asserts no other ground for recovery than its original claims"), cert. denied, 377 U.S. 917 (1964); *Dale Distrib. Co.* v. *Commissioner*, 269 F.2d 444, 448 (2d Cir. 1959) (concluding that "the undisputed facts are a perfect demonstration of waiver"). Because those cases did not expressly decide the question answered by the court of appeals here, there is no conflict warranting review by this Court.[3]

Petitioner also contends (Pet. 15) that the court of appeals' ruling is inconsistent with this Court's decisions in *United States* v. *Kales*, 314 U.S. 186 (1941), and

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[3] Petitioner also argues (Pet. 13-14) that the court of appeals' decision conflicts with several decisions of the Tax Court. Any such conflict, however, would not warrant this Court's review. See generally Sup. Ct. R. 10.

United States v. *Memphis Cotton Oil Co.*, 288 U.S. 62, 71 (1933). That contention, which merely takes issue with the court of appeals' application of settled law to the facts of this case, does not warrant this Court's review. In any event, the decision below is consistent with both *Kales* and *Memphis Cotton Oil*.

In *Kales*, the Court held that a timely claim, presented in an informal letter and not rejected by the IRS as defective in form, could be amended by an untimely formal claim that "only made more specific the allegations of [the taxpayer's] earlier informal claim." 314 U.S. at 193-197. That situation, as the court of appeals recognized (Pet. App. 15), is distinguishable from the situation here, where petitioner's original claim was a formal one, and the untimely amendment raised an entirely new claim. Although (as petitioner points out, Pet. 15) the *Kales* Court noted the IRS's "consistent administrative treatment" of the informal letter and the later amendment as a claim for a refund, the Court did not consider or decide whether the IRS could have treated the untimely amendment as a refund claim if that amendment had, as here, attempted to assert a new and different claim.

The situation in *Memphis Cotton Oil* is likewise distinguishable. As the court of appeals observed, "[i]n *Memphis Cotton*, the Supreme Court found a waiver where (during investigation of the taxpayer's original claim and within the limitations period) the Commissioner discovered that the taxpayer was entitled to a refund on a specific ground, and notified the taxpayer that a refund would be made." Pet. App. 16. As this Court later observed, "[t]his was far from holding that after the period set forth by the statute for the filing of claims [the Commissioner] had power to accept and act

upon claims that complied with or violated his regulations." *Garbutt Oil*, 302 U.S. at 533-334 (discussing *Memphis Cotton Oil*). That is the situation here. The letter from the IRS upon which petitioner relies for waiver "occurred long after the expiration of the limitations period." Pet. App. 21.

Petitioner further contends (Pet. 16-18) that the court of appeals' ruling is inconsistent with the case law allowing refund claims to be amended after the limitation period has expired. Petitioner improperly conflates the rules applicable to waiver and amendment. An untimely amendment is permitted only when it is germane to the original, timely claim. See *United States* v. *Andrews*, 302 U.S. 517, 521 (1938). The doctrine of waiver, by contrast, can be invoked even when the taxpayer asserts new grounds for a refund wholly unrelated to its original claim. But allowance of such a new claim when, as here, the limitation period already has expired, would be tantamount to a waiver of the limitation period on new claims, which is beyond the authority of the IRS. See *Garbutt*, 302 U.S. at 534 ("[N]o officer of the government has power to waive the statute of limitations."). Contrary to petitioner's assertion (Pet. 20-21), the court of appeals' conclusion in that regard is not only faithful to, but required by, this Court's decisions distinguishing between the nonwaivability of statutory limitations and the waivability of regulatory requirements.[4]

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[4] Petitioner also incorrectly suggests (Pet. 16-17) that the court of appeals' decision regarding waiver is in conflict with *Pink* v. *United States*, 105 F.2d 183 (2d Cir. 1939). That case involved the different question whether a refund claim continued to be pending with the IRS, such that it was susceptible to amendment, when the IRS had rejected the claim but later reopened the claim for consideration of an intervening Supreme Court decision affecting the substance of the claim. *Id.* at

2. a. The court of appeals correctly rejected (Pet. App. 27-30) petitioner's argument that its untimely amended refund claim could relate back to its original refund claim. The court rejected that argument "for two separate reasons." *Id.* at 27. First, it concluded that petitioner's amended refund claim, which raised the interest-suspension issue with respect to the interest on the non-DISC deficiencies, was not germane to its original claim, which raised only the DISC qualification issue. *Id.* at 27-28. That conclusion is correct, because petitioner's amended claim did not "merely make[] more definite the matters already within [the IRS's] knowledge, or which, in the course of [its] investigation, [it] would naturally have ascertained," but "invoke[d] action requiring examination of other matters not germane to the first claim." *Andrews*, 302 U.S. at 524.

Second, the court concluded that petitioner's original claim was not susceptible of amendment because it ceased to be pending with the IRS when petitioner filed this refund suit. Pet. App. 28-30. As this Court has observed, when the administrative proceeding has come to an end, "there is no longer anything to amend." *Memphis Cotton Oil*, 288 U.S. at 72; see *Union Pac. R.R.* v. *United States*, 389 F.2d 437, 447 (Ct. Cl. 1968). The court of appeals concluded that "[t]he same rule necessarily applies where the taxpayer elects to terminate the IRS's jurisdiction by filing a suit for refund." Pet. App. 29. The court reasoned that, once a suit is filed, "[t]he IRS no longer has the authority to resolve the claim, and therefore is without power to 'allow' or 'disallow' it."

185, 187. Moreover, the court in *Pink* held that the amendment was germane to the original claim; indeed, the court concluded that "it may well be argued that the original claim was enough" to assert the new claim. *Id.* at 187.

Ibid. That conclusion is correct. See 28 U.S.C. 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); 26 U.S.C. 7122(a); Exec. Order No. 6166, § 5, 5 U.S.C. 901 note.[5]

b. On the second point, the court of appeals believed that the Second and Eleventh Circuits had adopted "a different rule, holding that an amendment is effective for purposes of the germaneness doctrine after the IRS has lost jurisdiction over the claim." Pet. App. 29 (citing *Mutual Assurance, Inc.* v. *United States*, 56 F.3d 1353 (11th Cir. 1995); *St. Joseph Lead Co.* v. *United States*, 299 F.2d 348 (2d Cir. 1962)). Contrary to petitioner's contention (Pet. 23-26), however, those cases are distinguishable from the present case and do not create a conflict warranting this Court's review.

In *St. Joseph Lead*, the taxpayer filed a refund suit and, one year later, the IRS decided to consider the merits of the claim. *St. Joseph Lead Co.* v. *United States*, 190 F. Supp. 637, 638 (S.D.N.Y. 1960), aff'd, 299 F.2d 348 (2d Cir. 1962). At DOJ's request, the IRS assigned a revenue agent to the case. *Id.* at 641 (on reconsideration); *id.* at 638. He discovered that the taxpayer had made computational errors, and the taxpayer filed

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[5] That Executive Order provides, in pertinent part, as follows:

> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

Exec. Order No. 6166, § 5, 5 U.S.C. 901 note.

an amended claim to correct the errors. *Id.* at 639. The Second Circuit held that the amendment related back to the original claim because "'in determining the merits of the original claim' [the IRS] would necessarily have ascertained 'the facts on which the amendment is based.'" *St. Joseph Lead*, 299 F.2d at 351.

Unlike *St. Joseph Lead*, the IRS here did not act upon petitioner's original refund claim at any time. Six months passed without the IRS acting upon the original claim, and petitioner then filed suit. See 26 U.S.C. 6532(a)(1). At no time during this litigation did the IRS undertake to resolve the merits of petitioner's original DISC claim. While negotiating a settlement of this case, DOJ solicited the IRS's non-binding recommendations, but DOJ never referred the case back to the IRS to evaluate the original refund claim or to recalculate the 1982 deficiency interest. Unlike in *St. Joseph Lead*, petitioner's case was not "being treated as if it were still in the administrative stage." *St. Joseph Lead*, 190 F. Supp. at 641 (on reconsideration).

The Eleventh Circuit's decision in *Mutual Assurance* is also inapposite because it did not present any question concerning the IRS's authority to consider a refund claim after the taxpayer files a refund suit. In *Mutual Assurance*, the taxpayer filed a claim for refund that was allowed in full. 56 F.3d at 1354. The IRS later conducted an examination of the taxpayer's claim and discovered a miscalculation of the taxpayer's loss reserves that caused the taxpayer to understate its refund claim. *Ibid.* The court found that the taxpayer's amended claim merely sought a larger amount while asserting the same grounds as the original claim, and that if the IRS had properly computed the taxpayer's refund in the first

instance, it would have arrived at the correct amount. *Id.* at 1356-1357.[6]

In any event, the question whether a refund claim ceases to be pending with the IRS when a taxpayer files suit is not one of exceptional importance warranting further review. First, it appears that the question has arisen, at most, only twice in over forty years: in the present case, and arguably in *St. Joseph Lead*, which was decided in 1962 (on fundamentally different facts). Second, the issue is not dispositive of this case: even if petitioner's claim were still pending before the IRS, petitioner would have to establish that the amendment was germane to the original claim. See *Andrews*, 302 U.S. at 524; *Mutual Assurance*, 56 F.3d at 1356-1357; *St. Joseph Lead*, 299 F.2d at 350-351. As discussed below, the court of appeals correctly held (Pet. App. 27) that the interest-suspension claim was not germane to the DISC claim.

c. Petitioner contends (Pet. 26) that the court of appeals "both misstated what the germaneness doctrine requires and misapplied that doctrine to the facts in this case." Specifically, petitioner argues (Pet. 27) that the court of appeals' articulation of the doctrine is inconsistent with the Second Circuit's "leading" decision in *Pink*

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[6] In this case, unlike in *Mutual Assurance*, the IRS did not undertake any examination of petitioner's original refund claim such that it could be characterized as pending with the IRS. Moreover, when petitioner filed its refund claim in 1989, the principle of interest suspension was not clearly established or routinely applied by the IRS. See Rev. Rul. 99-40, *supra*. Petitioner cites Internal Revenue Manual § 20.2.8.9.1(1)(A) for the proposition that interest suspension is "one of the 'normal . . . considerations' involved in the computation of interest" (Pet. 22), but that section of the Internal Revenue Manual was added on July 31, 2001, twelve years after petitioner filed its claim for refund.

v. *United States*, 105 F.2d 183 (1939), which petitioner did not cite or discuss until its rehearing petition in the court below.

In attempting to show that the court of appeals applied the wrong test, petitioner selectively quotes from the court's opinion (Pet. 27-28), but the court correctly stated and applied the rule urged by petitioner and set forth in *Pink*. Petitioner states that, according to *Pink*, "the application of the germaneness requirement * * * involves looking to the facts upon which the amendment is based." Pet. 27 (quotation marks omitted) (quoting Pet. App. 26 n.16). That is precisely the rule followed by the court of appeals here, which stated that an amendment is "'germane' to the original claim" if it "depends upon facts that the IRS examined or should have examined within the statutory period while determining the merits of the original claim." Pet. App. 24; see *id.* at 24-25. The court of appeals properly concluded that "[t]he determination of the interest attributable to the DISC deficiency did not require the IRS to compute non-DISC interest under the interest suspension theory," noting that petitioner "admitted that even as of late 1999, it was unaware that an interest suspension claim was available." *Id.* at 27.[7]

Petitioner's remaining arguments in this regard (Pet. 28-29) merely renew its arguments, rejected by the court of appeals (Pet. App. 27-28), that its interest-suspension claim was in fact germane to the DISC claim. The court's application of the law to the facts of this case does not warrant review by this Court.

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[7] Indeed, petitioner would have had a claim for interest suspension regardless of the outcome of the DISC issue. Pet. App. 77-81.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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